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Supreme Court, U.S.
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No. __-__

IN THE

Supreme Court of the United States

ENRON POWER MARKETING, INC.,

Petitioner,

v.

FEDERAL ENERGY REGULATORY COMMISSION, *et al.*,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

APPENDIX TO PETITION FOR A WRIT OF CERTIORARI (Volume II)

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TABLE OF CONTENTS

APPENDICES: Page

A. Judgment of the United States Court of Appeals for the District of Colombia Circuit filed June 30, 2000 .... 1a

B. Opinion of the United States Court of Appeals for the District of Columbia Circuit filed June 30, 2000 .... 3a

C. Order of the United States Court of Appeals for the District of Columbia Circuit filed Aug. 22, 2000 ..... 123a

D. *Promoting Wholesale Competition Through Open Access Non-Discriminatory Transmission Services by Public Utilities and Transmitting Utilities*, Order No. 888, [1991-96 Reg. Preambles] F.E.R.C. Stats. & Regs. ¶ 31,036 (1996) (pertinent portions).. 125a

E. *Promoting Wholesale Competition Through Open Access Non-Discriminatory Transmission Services by Public Utilities; Recovery of Stranded Costs by Public Utilities and Transmitting Utilities*, Order No. 888-A, [Reg. & Preambles] III F.E.R.C. Stats. & Regs. ¶ 31,048 (1997) (pertinent portions) 371a

F. *Promoting Wholesale Competition Through Open Access Non-Discriminatory Transmission Services by Public Utilities; Recovery of Stranded Costs by Public Utilities and Transmitting Utilities, Notice of Proposed Rulemaking and Supplemental Notice of Proposed Rulemaking*, Notice of Proposed Rulemaking, [1988-1998 Proposed Regs.] F.E.R.C. Stats. & Regs. ¶ 32,514 (1995) (pertinent portion) ... 553a

G. Statutory Provisions 645a

H. List of Parties to the Proceeding 683a

APPENDIX E

***Promoting Wholesale Competition Through Open Access Non-Discriminatory Transmission Services by Public Utilities; Recovery of Stranded Costs by Public Utilities and Transmitting Utilities*, Order No. 888-A, [Reg. & Preambles] III F.E.R.C. Stats. & Regs. ¶ 31,048 (1997) (pertinent portions)**

APPENDIX E

[30,172]

[¶31,048]

62 F.R. 12274 (March 14, 1997)

18 C.F.R. Part 35

[Docket Nos. RM95-8-001 and RM94-7-002; Order No. 888-A]

Promoting Wholesale Competition Through Open Access Non-discriminatory Transmission Services by Public Utilities; Recovery of Stranded Costs by Public Utilities and Transmitting Utilities

Issued March 4, 1997

AGENCY: Federal Energy Regulatory Commission.

ACTION: Final rules; order on rehearing.

SUMMARY: The Federal Energy Regulatory Commission (Commission) reaffirms its basic determinations in Order No. 888 and clarifies certain terms. Order No. 888 requires all public utilities that own, control or operate facilities used for transmitting electric energy in interstate commerce to have on file open-access non-discriminatory transmission tariffs that contain minimum terms and conditions of non-discriminatory service. Order No. 888 also permits public utilities and transmitting utilities to seek recovery of legitimate, prudent and verifiable stranded costs associated with providing open-access and Federal Power Act section 211 transmission services. The Commission's goal is to remove impediments to competition in the wholesale bulk power marketplace and to bring more efficient, lower cost power to the Nation's electricity consumers.

EFFECTIVE DATE: Changes to Order No. 888 made in this order on rehearing will become effective on [insert date 60 days after date of publication in the *Federal Register*].

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[30,173]

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Finally, the complete text on diskette in Wordperfect format may be purchased from the Commission's copy contractor, La Dorn Systems Corporation. La Dorn Systems Corporation is also located in the Public Reference Room at 888 First Street, NE., Washington, DC 20426.

Table of Contents

I. Introduction and Summary

II. Public Reporting Burden

III. Background

IV. Discussion

A. Scope of the rule

1. Introduction

2. Functional Unbundling

3. Market-based Rates

a. Market-based Rates for New Generation

b. Market-based Rates for Existing Generation

4. Merger Policy

5. Contract Reform

6. Flow-based Contracting and Pricing

B. Legal Authority

C. Comparability

1. Eligibility to Receive Non-discriminatory Open-Access Transmission

a. Unbundled Retail Transmission and "Sham Wholesale Transactions"

b. Transmission Providers Taking Service Under Their Tariff

2. Service that Must be Provided by Transmission Provider

3. Who Must Provide Non-discriminatory Open-Access Transmission

4. Reservation of Transmission Capacity by Transmission Customers

5. Reservation of Transmission Capacity for Future Use by Utility

6. Capacity Reassignment

7. Information Provided to Transmission Customers

8. Consequences of Functional Unbundling

a. Distribution Function

b. Retail Transmission Service

c. Transmission Provider

1. Taking Service Under the Tariff

2. Accounting Treatment

D. Ancillary Services

1. Specific Ancillary Services

a. Scheduling, System Control and Dispatch Service

b. Reactive Supply and Voltage Control from Generation Sources Service

c. Energy Imbalance Service

(1) Description of Energy Imbalance

(2) Energy Imbalance Bandwidth

2. Ancillary Services Obligations

a. Obligation of a Control Area Utility

b. Obligation to Provide Dynamic Scheduling

c. Obligation As Agent

3. Miscellaneous Ancillary Services Issues

a. Transmission Provider as Ancillary Services Merchant

b. QF Receipt of Ancillary Services

c. Pricing of Ancillary Services

E. Real-Time Information Networks

F. Coordination Arrangements: Power Pools, Public Utility Holding Companies, Bilateral Coordination Arrange-ments, and Independent System Operators

1. Tight Power Pools

2. Loose Pools

3. Public Utility Holding Companies

4. Bilateral Coordination Arrangements

G. *Pro Forma* Tariff

1. Tariff Provisions That Affect The Pricing Mechanism

a. Non-Price Terms and Conditions

[30,174]

b. Network and Point-to-Point Customers' Uses of the System (so-called "Headroom")

c. Load Ratio Sharing Allocation Mechanism for Network Service

(1) Multiple Control Area Network Customers

(2) Twelve Monthly Coincident Peak v. Annual System Peak

(3) Load and Generation "Behind the Meter"

(4) Existing Transmission Arrangements associated with Generating Capacity Entitlements (*e.g.*, "preference power" customers of PMAs)

d. Annual System Peak Pricing for Flexible Point-to-Point Service

e. Opportunity Cost Pricing

(1) Recovery of Opportunity Costs

(2) Redispatch Costs

f. Expansion Costs

g. Credit for Customers' Transmission Facilities

h. Ceiling Rate for Non-firm Point-to-Point Service

i. Discounts

j. Other Pricing Related Issues Not Specifically Addressed in the Final Rule

(1) Demand Charge Credits

(2) In-Kind Transactions

2. Priority For Obtaining Service

a. Reservation Priority for Existing Firm Service Customers

b. Reservation Priority for Firm Point-to Point and Network Service

c. Reservation Priorities for Non-firm Service

3. Curtailment and Interruption Provisions

a. Pro-rata Curtailment Provisions

b. Curtailment and Interruption Provisions for Non-firm Service

4. Reciprocity Provision

5. Liability and Indemnification

6. Umbrella Service Agreements

7. Other Tariff Provisions

a. Minimum and Maximum Service Periods

b. Amount of Designated Network Resources

c. Eligibility Requirements

d. Two-Year Notice of Termination Provision

e. Termination of Service for Failure to Pay Bill

f. Definition of Native Load Customers

g. Off-System Sales

h. Requirements Agreements

i. Use of Distribution Facilities

j. Losses

k. Modification of Non-rate Terms and Conditions

l. Miscellaneous Tariff Modifications

(1) Ancillary Services

(2) Clarification of Accounting Issues

(a) Transmission Provider's Use of Its System (Charging Yourself)

(b) Facilities and System Impact Studies

(c) Ancillary Services

(3) Miscellaneous Clarifications

(a) Electronic Format

(b) Administrative Changes

8. Specific Tariff Provisions

9. Miscellaneous Tariff Administrative Changes

10. *Pro Forma* Tariff Compliance Filings

H. Implementation

1. Group 1 Public Utilities

2. Group 2 Public Utilities

3. Clarification Regarding Terms and Conditions Reflecting Regional Practices

4. Future Filings

5. Waiver

I. Federal and State Jurisdiction: Transmission/Local Distribution

J. Stranded Costs

1. Justification for Allowing Recovery of Stranded Costs

2. *Cajun Electric Power Cooperative, Inc. v. FERC*

3. Responsibility for Wholesale Stranded Costs (Whether to Adopt Direct Assignment to Departing Customers)

4. Recovery of Stranded Costs Associated With New Wholesale Requirements Contracts

[30,175]

5. Recovery of Stranded Costs Associated With Existing Wholesale Requirements Contracts

6. Recovery of Stranded Costs Caused by Retail-Turned-Wholesale Customers

7. Recovery of Stranded Costs Caused by Retail Wheeling

8. Evidentiary Demonstration Necessary—Reasonable Expectation Standard

9. Calculation of Recoverable Stranded Costs

10. Stranded Costs in the Context of Voluntary Restructuring

11. Accounting Treatment for Stranded Costs

12. Definitions, Application, and Summary

K. Other

1. Information Reporting Requirements for Public Utilities

2. Small Utilities

3. Regional Transmission Groups

4. Pacific Northwest

5. Power Marketing Agencies

a. Bonneville Power Administration (BPA)

b. Other Power Marketing Agencies

6. Tennessee Valley Authority

7. Hydroelectric Power

8. Residential Customers

9. Miscellaneous Issues

V. Environmental Statement

A. The Appropriate No-Action Alternative

B. Challenges to Modeling Assumptions

1. Appropriate Base Case

2. Challenge to the Use of Computer Modeling
3. Transmission Assumptions
4. Plant Availabilities and Heat Rates
5. Reserve Margins
6. Northeast MOU
7. Natural Gas Prices
8. Expanded Transmission Analysis

C. Mitigation
D. Emissions Standards Disparity
E. Short-Term Consequences of the rule
G. Cost Benefit Analysis
H. Socioeconomic Impacts
I. Coastal Zone Management Act
VI. Regulatory Flexibility Act Certification
A. Docket No. RM95-8-000 (Open Access Final Rule)
1. Public Utilities
2. Non-Public Utilities
B. Docket No. RM94-7-000 (Stranded Cost Final Rule)
1. Public Utilities
2. Non-Public Utilities
VII. Information Collection Statement
VIII. Effective Date

I. Introduction and Summary

On April 24, 1996, the Commission issued Final Rules (Order Nos. 888 [FERC Statutes and Regulations, Regulations Preambles January 1991-June 1996 ¶31,036] and 889 [FERC Statutes and Regulations, Regulations Preambles

January 1991-June 1996 ¶31,035) intended to remedy undue discrimination in the provision of interstate transmission services by public utilities and to address the stranded costs that may result from the transition to more competitive electricity markets.[1] At the heart of these rules is a requirement that prohibits owners and operators of monopoly transmission facilities from denying transmission access, or offering only inferior access, to other power suppliers in order to favor the monopolists' own generation and increase monopoly profits—at the expense of the nation's electricity consumers and the economy as a whole.

The electric utility industry today is not the industry of ten years ago, or even

[30,176]

five years ago. While historically it was assumed that local utilities would be the only ones to generate and transmit power for their customers, today there is a broad array of potential competitors to supply power and widespread transmission facilities that can carry power vast distances. But competitors cannot reach customers if they cannot have fair access to the transmission wires necessary to reach those customers. It is against this industry backdrop that the Commission in Order No. 888 exercised its public interest responsibilities pursuant to sections 205 and 206 of the Federal Power Act (FPA), to reexamine undue discrimination in interstate transmission services and the effect of that

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[1] Promoting Wholesale Competition Through Open Access Non-discriminatory Transmission Services by Public Utilities and Recovery of Stranded Costs by Public Utilities and Transmitting Utilities, Order No. 888, 61 FR 21,540 (May 10, 1996), *FERC Statutes and Regulations, Regulations Preambles January 1991-June 1996* ¶31,036, *clarified*, 76 FERC ¶61,009 and 76 FERC ¶61,347 (1996). Order No. 889 [*FERC Statutes and Regulations, Regulations Preambles January 1991-June 1996* ¶31,035] is an accompanying rule and specific rehearing arguments on that rule will be addressed separately.

discrimination on the electricity customers whom we are bound to protect under the FPA.

We here reaffirm the legal and policy bases on which Order No. 888 is grounded. Utility practices that were acceptable in past years, if permitted to continue, will smother the fledgling competition in electricity markets and undermine the national policies reflected in the Energy Policy Act of 1992 to encourage the development of competitive markets. We firmly believe that our authorities under the FPA not only permit us to adapt to changing economic realities in the electric industry, but also require us to do so, as necessary to eliminate undue discrimination and protect electricity customers. The record supports our conclusion that, absent open access, undue discrimination will continue to be a fact of life in today's and tomorrow's electric power markets. As recent events clearly demonstrate, unbundled electric transmission service will be the centerpiece of a freely traded commodity market in electricity in which wholesale customers can shop for competitively-priced power.

The only way to effectuate competitive markets and remedy discrimination is through readily available, non-discriminatory transmission access. The Commission estimates the potential quantitative benefits from such access will be approximately $3.8 to $5.4 billion per year in cost savings, in addition to the non-quantifiable benefits that include better use of existing assets and institutions, new market mechanisms, technical innovation, and less rate distortion.

Order No. 888 has two central components. The first requires all public utilities that own, operate or control interstate transmission facilities to offer network and point-to-point transmission services (and ancillary services) to all eligible buyers and sellers in wholesale bulk power markets, and to take transmission service for their own uses under the same rates, terms and conditions offered to others. In other

words, it requires non-discriminatory (comparable) treatment for all eligible users of the monopolists' transmission facilities. The non-discriminatory services required by Order No. 888, known as open-access services, are reflected in a *pro forma* open-access tariff contained in the Rule. The rule also requires functional separation of the utilities' transmission and power marketing functions (also referred to as functional unbundling) and the adoption of an electric transmission system information network.

The second central component of Order No. 888 was to address whether and how utilities will be able to recover costs that could become stranded when wholesale customers use the open-access tariffs, or FPA section 211 tariffs,[2] to leave their utilities' power supply systems and shop for power elsewhere. Because of competitive changes occurring at the retail level, as numerous states have begun retail transmission access programs, Order No. 888 also clarifies whether and when the Commission may address stranded costs caused by retail wheeling and the extent of the Commission's jurisdiction over unbundled retail transmission. The Commission further addresses the circumstances under which utilities and their wholesale customers may seek to modify contracts made under the old regulatory regime, taking into account the goals of reasonably accelerating customers' ability to benefit from competitively priced power and at the same time ensuring the financial stability of electric utilities during the transition to competition.

[30,177]

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[2] Under section 211 of the FPA, the Commission, on a case-by-case basis upon application by an eligible customer, may order both public utilities and non-public utilities that own or operate transmission facilities used for the sale of electric energy at wholesale to provide transmission services to the applicant if it finds it is in the public interest to issue such order.

137 entities filed requests for rehearing and/or clarification of Order No. 888. While these parties raise a variety of arguments—including legal, policy, and technical arguments—the majority (including a majority of public utilities) agree that we need to harness the benefits that competitive electricity markets can bring to the nation. The disagreements primarily focus on the mechanics of how we should do this, who should pay the costs of the transition to competition, and how long the transition should take.

First, parties disagree on what is necessary to remedy undue discrimination and to develop truly competitive wholesale markets. Many focus specifically on the tariff terms and conditions of good transmission access and seek changes in the Order No. 888 *pro forma* tariff. In response to these types of rehearing arguments, the Commission has fine-tuned or changed some of the *pro forma* tariff terms and conditions to better ensure that they do not permit discrimination and that they result in well-functioning markets. Other petitioners focus on additional structural changes which they believe are necessary, such as mandatory corporate restructuring (divestiture of generation assets) or mandatory creation of independent transmission system operators (ISOs). With regard to restructuring, the Commission continues to believe that functional unbundling of the utility's business, not corporate divestiture or mandatory ISOs, is sufficient to remedy undue discrimination at this time.

The most contentious arguments raised on rehearing involve how we deal with the transition costs associated with moving to competition. Some utilities have invested millions of dollars in facilities and purchased power contracts based on an explicit or implicit obligation to serve customers and the expectation that those customers would remain on their systems for the foreseeable future. These utilities face so-called "stranded costs" which, if not recovered from the

customers that caused the costs to be incurred, could be shifted to other customers.

There are two basic categories of rehearing arguments regarding stranded cost recovery. Most utilities want a guarantee from this Commission that they will recover all stranded costs, whether caused by losing retail customers or wholesale customers. Many customers, on the other hand, want to be able to abrogate existing power supply contracts so that they can immediately leave their current suppliers' systems and shop for cheaper power elsewhere, without paying the sunk costs that their suppliers incurred on their behalf.

In response to these diverse arguments, the Commission has struck a reasonable balance that, for certain defined circumstances, permits utilities the *opportunity* to seek extra-contractual recovery of stranded costs from their departing customers and permits customers the *opportunity* to make a showing that their contracts should be shortened or terminated. Based on our experience in the natural gas area, we have learned that it is critical to address these issues early, but we also have chosen an approach different from that taken in the gas area because of the different circumstances facing the electric industry.

In balancing the wide array of interests reflected in the rehearing petitions, we have made a number of clarifications and granted rehearing on some issues, but we reaffirm the core elements and framework of Order No. 888. Since the time the final rules issued, as discussed in section III, the pace of competitive change has continued to escalate in the industry at both the wholesale and retail levels as competitors, customers and state regulatory authorities aggressively seek ways to lower the price of electricity. We therefore believe it is all the more critical that we remedy undue discrimination in interstate transmission services now, and that we do so generically, if we are to fulfill our responsibilities under the FPA to protect consumers and

provide a fair and orderly transition to new competitive markets.

Finally, with respect to environmental issues associated with this rulemaking, certain parties on rehearing continue to challenge the adequacy of our Final Environmental Impact Statement (FEIS). The central issues are whether the Final Rule will increase emissions of nitrogen oxides (NO_x) from certain fossil-fuel fired generators, which could affect air quality in downwind areas to which these emissions may be carried, and the Commission's authority to mitigate environmental consequences.

[30,178]

We deny rehearing on the environmental issues raised and affirm our conclusion that we have satisfied our obligations under NEPA. As discussed in detail in the Final Rule, this rulemaking is expected to slightly increase or slightly decrease total future NO_x emissions, depending on whether competitive conditions in the electric industry favor the utilization of natural gas or coal as a fuel for the generation of electricity. We also examined mitigation options over the longer term, and found that the preferred approach for mitigating any adverse environmental consequences would be for the Environmental Protection Agency (EPA) and the states to address the problem through regulatory authorities available under the Clean Air Act. The petitions for rehearing have not persuaded us to change this approach. Indeed, we note that since the issuance of Order No. 888, the EPA has concluded that the rule is unlikely to have any immediate significant adverse environmental impact and thus concurred that the Commission's analysis is adequate under NEPA. We further note that EPA has recently taken steps under the Clean Air Act to address NO/x/ emissions as part of a comprehensive emissions control program, along the lines endorsed by the Commission in the EIS.

In summary, the Commission believes that our authorities under the FPA not only permit us to adapt to changing economic realities in the electric industry, but also require us to do so to eliminate undue discrimination and protect electricity customers. The measures required in Order No. 888 are necessary to remedy undue discrimination in interstate transmission services and provide an orderly and fair transition to competitive bulk power markets.

To assist the reader, we provide below a section-by-section summary of key elements of this Order on Rehearing.

Scope of the Rule

In this section we discuss petitions to rehear our requirement that transmission and power sales services be contracted for separately (unbundled). We reaffirm that this requirement is a reasonable and workable means of assuring non-discriminatory open-access transmission. In doing so we refuse invitations to require that utilities under our jurisdiction divest themselves of generation or transmission assets. We do, however, make an important clarification involving how we will deal with existing contracts that contain so-called *Mobile-Sierra* clauses (clauses under which one or both parties agreed not to seek modification of contract terms unless they could show that it is contrary to the public interest not to permit the modification).

In Order No. 888 we concluded that contracts would not be abrogated by operation of the Rule. Instead, preexisting contracts would continue to be honored until such time as they were revised or terminated. We also found that those who were operating under pre-existing requirements contracts containing *Mobile-Sierra* clauses would nonetheless be allowed to seek reform of the contracts on a case-by-case basis. On rehearing we affirm that public utilities will be allowed to file to amend their *Mobile-Sierra* contracts for the limited purpose of providing an opportunity to seek recovery of stranded costs, without having to make a

public interest showing that such cost recovery should be permitted. However, these utilities will have the burden, on a case-by-case basis, of showing that they had a reasonable expectation of continuing to serve the departing customer after the contract term. We clarify that if the utilities under such contracts seek to modify provisions that do *not* relate to stranded costs, they will have the burden of showing that the provisions are contrary to the public interest.

We here make clear that, in turn, customers will be allowed to file to amend their *Mobile-Sierra* contracts to modify any contract term or to terminate the contract, without having to make a showing that the contract terms are contrary to the public interest. Instead, customers seeking modifications must demonstrate that the provisions they wish modified are no longer "just and reasonable." We reaffirm our conclusion in the Final Rule that if a customer seeks to shorten or eliminate the term of its contract, however, any contract modification approved by the Commission will provide for appropriate stranded cost recovery by the customer's supplying utility.

These various provisions meet the two-fold need to deal with stranded costs and the contracts under which those costs were incurred. However, as described in

[30,179]

Order No. 888, the opportunity to reform *Mobile-Sierra* contracts extends only to a limited set of contracts—those entered into on or before July 11, 1994, for requirements power.

Comparability

In this section we deal with those requesting rehearing of our conclusions regarding what "comparable" service is, who is eligible for that service, and how it is to be implemented. We reaffirm our finding that, as a matter of law, we have jurisdiction over the rates, terms and conditions of unbundled

transmission service provided to retail customers. We also clarify that we have authority to order "indirect" unbundled retail transmission services and that if such transmission is ordered by us in the future, or if it is provided voluntarily, otherwise eligible customers may obtain such service under the open-access tariff. We expect public utilities to provide such service in the future and, if they do not, we will not hesitate to order it.

We modify in two respects the definition of who is eligible for open-access transmission service. First, we clarify that, with respect to service that this Commission is prohibited from ordering by section 212(h) of the Federal Power Act (retail wheeling directly to an ultimate consumer and "sham" wholesale wheeling), entities are eligible for such service under the tariff only if it is provided pursuant to a state requirement or is provided voluntarily. Second, we clarify that retail customers taking unbundled service pursuant to a state requirement (i.e., direct retail service) are eligible for such service only from those transmission providers that the state orders to provide service. These changes are made to make clear that our rules cannot be used to circumvent the proscriptions placed on the Commission against ordering direct retail wheeling.

Ancillary Services

In this section we deal with petitions to rehear our definitions of ancillary services—those services such as scheduling, voltage control, and supplemental reserve service that must or can attend the providing of transmission service—as well as the provisions involving these services. We reaffirm that tariffs must separately state the charges for these services. We do modify some of the definitions of these services to conform to industry needs and practices. Most importantly, we make clear that the transmission provider's sale of ancillary services associated with providing basic transmission service is not a wholesale merchant function

and thus does not violate the standards of conduct imposed with Order No. 889.

Coordination Arrangements

The requirement to provide non-discriminatory open-access transmission applies to any agreement between utilities that contains transmission rates, terms or conditions. This includes pooling arrangements and agreements between companies contracting to provide each other mutually beneficial transmission services. In Order No. 888 we laid out rules under which the open-access comparability requirements would apply to tight and loose power pools, public utility holding companies and bilateral coordination agreements. We also set out principles that would govern our approval of independent system operator (ISO) agreements.

In this section we affirm the rules governing coordination agreements. In doing so we clarify the definition of "loose pool." We also make clear that, unlike in other situations where we require utilities to provide not only the services they provide themselves but those they could provide themselves, we will require members of loose pools to offer to third parties only those transmission services that they provide themselves under their pool-wide agreements.

We also reaffirm our strong commitment to the concept of ISOs and the ISO principles described in Order No. 888. In doing so we reject arguments that we should require that ISOs be formed. At the same time, we emphasize that while there is no "cookie-cutter" approach to forming an acceptable ISO, the requirement of fair and non-discriminatory rules of governance (Principle One) and the requirement that ISO employees have no financial interest in the economic interests of power marketers—backed by strict conflict of interest provisions—(Principle Two) are fundamental to our approving any ISO.

Pro Forma Tariff Provisions

The *pro forma* tariff is the basic mechanism implementing the requirements of comparable open-access transmission. It

[30,180]

provides the details of the transmission service obligations imposed on jurisdictional utilities by the Rule. On rehearing we affirm most of the provisions set out in Order No. 888 for the *pro forma* tariff. We do make changes to conform the *pro forma* tariff to changes adopted under other sections (for example, the definition of "eligible customer").

The rehearing petitions raised many questions about how particular aspects of the tariff will work. For the most part, these questions cannot be answered generically, but must be resolved on a case-by-case basis in the context of specific fact situations. However, the petitions brought to light issues that require clarifications and in some cases revisions to the tariff. The most significant of these involve discounting practices, provisions governing priority of service and curtailment, and the reciprocity provision.

Discounting practices. Originally, we provided different rules depending upon whether the transmission provider was offering a discount to itself or an affiliate or offering a discount to a non-affiliate. In response to the rehearing petitions, we are making three significant changes to the discounting requirements to better permit the ready identification of discriminatory discounting practices while also providing greater discount flexibility.

First, any discount offered on transmission services (including supporting ancillary services) by a transmission provider or requested by any customer must now be made only over the OASIS. With this change, all will have the same, timely access to discounted services. In making this change, we clarify that a transmission provider may limit its discounted service to particular time periods.

Second, once the provider and customer agree on a discount, the details of the discounted service—the price, points of receipt and delivery, and length of service—must be immediately posted on the OASIS.

Third, we revise our rule respecting what other transmission paths must be offered at a discount. Originally, in Order No. 888, we required that when a discount was offered over one path, the transmission provider would have to provide that discount over all other unconstrained paths on its system. We will no longer require this. Instead, the discount will be limited to those unconstrained paths that go to the same point(s) of delivery as the discounted service being provided on the transmission provider's system. The discount will extend for the same time period and must be offered to all transmission service customers.

Priority and Curtailment. We affirm the right of first refusal policy that reservation priority continues for firm service customers served under a contract of one year or more. We also affirm that curtailment must be made on a pro-rata basis and clarify that non-firm point-to-point service is subordinate to firm service. However, we clarify that the pro-rata curtailment requirement extends to only those transactions that alleviate the constraint.

Reciprocity. In Order No. 888 we conditioned the use of a public utility's open-access service on the agreement that, in return, it is offered reciprocal service by non-public utilities that own or control transmission facilities. Such reciprocal service does not have to be through an open-access tariff, i.e., a tariff available to all eligible customers, but may be limited to those public utilities from whom the non-public utility obtains open-access service. We affirm the reciprocity condition. In doing so, however, we make several clarifications.

First, a public utility is free to offer transmission service to a non-public utility without requiring reciprocal service in

return. In other words, it may voluntarily waive the reciprocity condition. However, if it chooses to do so, transmission service must be provided through the *pro forma* tariff. Alternatively, bilateral agreements for transmission service provided by the public utility will not be permitted.

Second, we clarify that under the reciprocity condition a non-public utility must agree to offer the Transmission Provider any transmission service the non-public utility provides or is capable of providing on its system. This means that the non-public utility undertaking reciprocity must have an OASIS and must operate under the standards of conduct imposed under Order No. 889 unless it is granted a waiver by the Commission or, where appropriate, by a regional transmission group (RTG) of which it is a member. We also clarify that a non-public utility cannot avoid its responsibilities by

[30,181]

obtaining transmission service through other transmission customers. Further, the seller as well as the buyer in the chain of a transaction involving a non-public utility will have to comply with the reciprocity condition.

Third, we adhere to our decision not to treat generation and transmission (G&T) cooperatives and their member distribution cooperatives as a single unit. Thus, the reciprocity provision extends to the G&T Cooperative and not to its member distribution cooperatives.

Fourth, we clarify the "safe harbor" provision under which a non-public utility may get a Commission decision that its transmission tariff suffices to meet reciprocity. A non-public utility may limit the use of any reciprocity tariff that it voluntarily files at the Commission to those transmission providers from whom the non-public utility obtains open-access service. A non-public utility also may satisfy reciprocity through bilateral agreements with a public utility. As a related matter, if a public utility believes a non-public

utility is violating the reciprocity condition, it may file with the Commission a petition to terminate its service to the non-public utility.

Fifth, we clarify that non-public utilities may include stranded cost provisions in their reciprocity tariffs.

Sixth, the order on rehearing removes the term "interstate" from the reciprocity provisions. This is to make clear that reciprocity applies even to those who do not own or control interstate transmission facilities; *i.e.*, foreign utilities and those located in the ERCOT region of Texas.

As to local furnishing bonds held by some public utilities, we clarify that all costs associated with the loss of tax-exempt status of those bonds caused by providing open-access transmission service are properly considered costs of providing that service. This includes costs of defeasing, redeeming, and refinancing those bonds.

Other Clarifications. In this order on rehearing we take the opportunity to clarify various other tariff provisions. Among these: Transmission providers do not have to take service under the open-access tariff for transmitting power purchased on behalf of their bundled retail customers. Also, the ability to reserve capacity to meet the reliability needs of a transmission provider's native load applies equally to present transmission and transmission that is built in the future.

Implementation

On rehearing, we make no substantive changes to the implementation provisions originally required under Order No. 888. For the most part, the implementation process has been completed. Utilities have made the requisite tariff and compliance filings and public and non-public utilities have, through other orders, been provided guidance as to obtaining waivers of Order No. 888 and Order No. 889 requirements.

We emphasize that we do not require the abrogation of existing contracts. Rather, the Rule requires only that transmission providers offer transmission under the open-access tariff in addition to existing service obligations. Commitments made under existing contracts will continue. Of course, both transmission providers and their customers may seek to revise the terms and conditions of existing contracts by making the necessary filings, as appropriate, under sections 205 or 206 of the Federal Power Act.

State and Federal Jurisdiction

On rehearing we reaffirm our decision that when transmission service is provided to serve retail customers apart from any contract for the retail sale of power, i.e., when it is provided on an unbundled basis, that transmission service is under our jurisdiction. In today's market, and increasingly in the future as more states adopt retail wheeling programs, retail transactions are, and will be, broken down into products that are sold separately—transmission and generation—and sold by different entities. The exercise of our jurisdiction over the rates, terms and conditions of unbundled retail transmission will, therefore, become more important. We also recognize that states have jurisdiction over facilities used for local distribution.

On rehearing we also reaffirm the seven-factor test of Order No. 888 to distinguish transmission under our jurisdiction from state-jurisdictional local distribution. In doing so, we recognize that our test does not resolve all possible issues. There may be other factors that should be taken into account. The test, therefore, is designed for flexibility to include

[30,182]

unique local characteristics and usages. To that end, we will continue to defer to state findings on these matters.

In addition, we clarify that states have the authority to determine the retail marketing areas of the electric utilities within their respective jurisdictions. We also recognize that states have the concomitant authority to determine the end-user services these utilities provide.

Stranded Costs

On rehearing, we reaffirm our basic decisions surrounding the recovery of stranded costs. Utilities will be allowed the opportunity to seek to recover legitimate, prudent, and verifiable wholesale stranded costs. This opportunity is limited to costs associated with serving customers under wholesale requirements contracts executed on or before July 11, 1994 that do not contain explicit stranded cost provisions; and costs associated with serving retail-turned-wholesale customers.

We clarify that we will consider on a case-by-case basis whether to treat a contract extended or renegotiated without a stranded cost provision as an existing contract for stranded cost purposes.

In each case, the opportunity to seek stranded costs is limited to situations in which there is a direct nexus between the availability and use of a Commission-required transmission tariff and the stranding of the costs. The Rule does not allow the recovery of costs that do not arise from the new, accelerated availability of non-discriminatory transmission access.

The Commission also reaffirms its decision that stranded costs should be recovered from the customer that caused the costs to be incurred. The Commission is not requiring other remaining customers, or the utility, to shoulder a portion of its stranded costs that meet the requirements for recovery.

The Commission, as described in Order No. 888, will be the primary forum for addressing the recovery of stranded

costs caused by retail-turned-wholesale customers. With respect to such cases, we have made several changes.

First, the Commission has reconsidered its decision respecting cases involving existing municipal utilities that annex retail customer service territories. Under Order No. 888, we found that in such cases the Commission should not be the primary forum for determining stranded cost recovery. On rehearing we now find that such cases should fall within our province.

Second, we clarify that the opportunity for recovery of stranded costs associated with retail-turned-wholesale customers applies regardless of whether the customer or its new supplier is the one requesting and contracting for the transmission service. To this end, we have revised the definition of "wholesale stranded cost."

With respect to the recovery of stranded costs caused by unbundled retail wheeling, we affirm that the only circumstance in which we will entertain requests for these types of costs is when the state regulatory authority does not have authority under state law to address stranded costs when the retail wheeling is required. We clarify that if a state regulatory authority has in fact addressed such costs, regardless of whether it has allowed full recovery, partial recovery or no recovery, utilities may not apply to the Commission to recover stranded costs caused by the retail wheeling.

Other

In this section we resolve questions concerning our information reporting requirements, regional transmission groups, and the special situations posed by utilities in the Pacific Northwest and by federal power marketing and similar agencies. Here we make some minor clarifications but make no significant changes to Order No. 888.

We are not persuaded that the information reporting requirements need to be changed at this time. Finally, we reject arguments that would have us fix generically any particular rate methodology for providing open-access transmission service under the *pro forma* tariff.

II. Public Reporting Burden

This order on rehearing issues a number of minor revisions to the Final Rule. We find, after reviewing these revisions, that they do not, on balance, increase the public reporting burden.

The Final Rule contained an estimated annual public reporting burden based on the requirements of the Open Access Final Rule and the Stranded Cost Final

[30,183]

Rule.[3] Using the burden estimate contained in the Final Rule as a starting point, we evaluated the public burden estimate contained in the Final Rule in light of the revisions contained in this order and assessed whether this estimate needed revision. We have concluded, given the minor nature of the revisions, and their offsetting nature, that our estimate of the public reporting burden of this order on rehearing remains unchanged from our estimate of the public reporting burden contained in the Final Rule. The Commission has conducted an internal review of this conclusion and has assured itself that there is specific, objective support for this information burden estimate. Moreover, the Commission has reviewed the collection of information required by the Final Rule, as revised by this order on rehearing, and has determined that the collection of information is necessary and conforms to

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[3] 61 FR 21540 at p. 21543; *FERC Statutes and Regulations, Regulations, Preambles January 1991 - June* ¶31,036, at p. 31,638 (1996). No comments were filed in objection to the public burden estimate contained in the Open Access Final Rule and the Stranded Cost Final Rule.

the Commission's plan, as described in the Final Rule, for the collection, efficient management, and use of the required information.

Persons wishing to comment on the collections of information required by the Final Rule, as modified by this order on rehearing, should direct their comments to the Desk Officer for FERC, Office of Management and Budget, Room 3019 NEOB, Washington, DC 20503, phone 202-395-3087, facsimile: 202-395-7285 or via the Internet at hillier_t@a1.eop.gov. Comments must be filed with the Office of Management and Budget within 30 days of publication of this document in the *Federal Register*. Three copies of any comments filed with the Office of Management and Budget also should be sent to the following address: Ms. Lois Cashell, Secretary, Federal Energy Regulatory Commission, Room 1A, 888 First Street, NE., Washington, DC 20426. For further information, contact Michael Miller, 202-208-1415.

III. Background

In the Final Rule, we detailed the events that led up to this rulemaking, including the significant technical, statutory and regulatory changes that have occurred in the electric industry since the FPA was enacted in 1935.[4] In particular, we focused on the competitive influences of the Public Utility Regulatory Policies Act of 1978, the Congressional mandate in the Energy Policy Act of 1992 to encourage competition in electricity markets, and the need for reform in the industry if consumers are to achieve the benefits that greater competition can bring.

In the ten months since the Final Rule issued, competitive changes have escalated at an even faster pace in virtually all areas of the electric industry. These changes are

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[4] *FERC Statutes and Regulations, Regulations Preambles January 1991-June 1996* at pp. 31,638-52; *mimeo* at pp. 13-51.

driven not only by the Commission's Final Rule, but also by state restructuring initiatives and by continuing pressures from customers to take advantage of emerging competitive markets and the lower electricity rates they can bring.

All of the existing 166 public utilities that own, control or operate interstate transmission facilities (listed as Group 1 and Group 2 utilities in the Final Rule) have filed the Order No. 888 *pro forma* open-access tariff or requested a waiver of the requirement. Similarly, they either have adopted an electronic information network or requested a waiver of the requirement. Five non-public utilities have submitted reciprocal transmission tariffs and more than 20 have requested a waiver of the reciprocity condition in the *pro forma* tariff.[5]

Significant competitive changes also have accelerated with respect to power pooling, state restructuring initiatives, and Independent System Operators (ISOs). Under Order No. 888 and subsequent implementation orders, the Commission

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required the filing of revised pooling agreements and joint pool-wide transmission tariffs by December 31, 1996, in order to remedy undue discrimination in transmission services provided through interstate power pooling arrangements. Among the power pool filings were a New England (NEPOOL) comprehensive restructuring proposal, a New York proposal, a Pennsylvania-New Jersey-Maryland (PJM) compliance filing and a Western Systems Power Pool filing.

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[5] As a condition of using a public utility's open-access tariff, any user, including non-public utilities, must offer reciprocal comparable transmission access to the public utility in return. Order No. 888 provides a voluntary mechanism whereby non-public utilities can obtain Commission confirmation that what they are offering meets the tariff reciprocity condition. Non-public utilities also may seek a waiver of the reciprocity condition.

In response to the Commission's encouragement in Order No. 888 of ISOs as a possible means for accomplishing comparable access, a number of utilities and states are well underway in developing this new institution. The fundamental purpose of an ISO is to operate the transmission systems of public utilities in a manner that is independent of any business interest in sales or purchases of electric power by those utilities. The Commission has received several proposals for forming ISOs, one as part of the multi-docketed filing engendered by California's restructuring plan, and others relating to power pool filings. A number of regions are also developing ISO proposals. Some regions previously considering regional transmission groups (RTGs), whose primary purpose is regional planning of transmission facility construction and upgrades, have now broadened their discussions to include an ISO.

Investor-owned utilities in California, at the order of both the state commission and the legislature, have filed proposals with the Commission that would transfer control of transmission facilities to an ISO in conjunction with the formation of a state-wide power exchange to facilitate both wholesale and retail access. While the case presents many complex issues for the Commission to resolve, the California proposal is fundamentally compatible with the pro-competitive open-access requirements of Order Nos. 888 and 889. The Commission's open-access policies therefore have provided a framework for California, and other states, to explore customer choice initiatives.

Other major regions of the country also are instituting ISOs. Member utilities of the PJM Power Pool filed competing ISO proposals with the Commission and are currently working to reconcile the differences between their proposals. The New York Power Pool recently filed a proposal to create an ISO and a power exchange for New York. The New England Power Pool is exploring a new industry structure for its region that centers on the creation of

an ISO. Utilities and other market participants in the Electric Reliability Council of Texas have also formed an ISO. Discussions are underway among utilities from Virginia to Wisconsin in an attempt to create a Midwestern ISO. Members of the Mid-America Power Pool are discussing an ISO proposal. In the Pacific Northwest, utilities are involved in negotiations intended to lead to the formation of an independent grid operator (Indego).

The combined available generation resources of the utilities in these groups is on the order of 428 GW out of a total of approximately 732 GW for total U.S. resources (as of the end of 1996). Thus, assuming these ISO arrangements come to fruition, about three-fifths of the industry may have independent system operators controlling their transmission systems.

Moreover, every state but one has proposed or is considering or developing retail competition programs. For example, New Hampshire, Illinois and Massachusetts began pilot programs in the past year, and retail transmission service for these pilot programs currently is being taken pursuant to tariffs approved by both the state commissions and this Commission. The Massachusetts Department of Public Utilities has sent a proposal to the state legislature calling for retail competition to begin in January 1998. The New York Public Service Commission has issued an order proposing that retail competition begin in early 1998. The New Jersey Board of Public Utilities has issued a proposal permitting customer choice beginning in October of 1998. The Vermont Public Service Board has sent a plan to the legislature recommending that full customer choice begin by the end of 1998. The Arizona Corporation Commission has adopted rules to phase-in competition over four years, beginning in January 1999. Recently, the Maine Public Utilities Commission issued a final report and recommendation to the legislature for retail competition to begin in January 2000. In addition, Rhode Island and

Pennsylvania both have new laws requiring customer choice. These are only a few of the many state initiatives that are under-

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way that will dramatically alter the structure of the electric industry.

Since Order No. 888 was issued, significant efforts also have been made to ensure that reliability of the transmission grid is maintained and that reliability criteria are compatible with competitive markets. The North American Electric Reliability Council (NERC) has continued its efforts to broaden its membership and to fashion reliability requirements to fit a more competitive electric power industry. For example, the NERC Board of Directors voted to require mandatory compliance by all power market participants with its reliability standards. NERC is also establishing new entities called regional security coordinators to oversee the stability of grid operations and to direct the development of an extensive new communications network. Various NERC committees are considering ways to improve the tracking of power transactions, identify the network impacts of transactions, and reflect the actual flow of power over the network when making reservations for transmission service. These efforts are likely to intensify as the industry continues to adapt to competitive changes occurring in the marketplace.

Thus, all segments of the electric industry have taken significant steps in the past year in response to the emerging wholesale competitive markets enabled by Order No. 888 as well as state retail competition initiatives. The competitive framework established by Order No. 888, whose centerpiece is non-discriminatory transmission services and a fair and orderly stranded cost recovery mechanism, is critical to the successful transition to, and full development of, the industry

restructuring proposals that are well underway in all major regions of the country.

IV . Discussion

A.Scope of the Rule

1. Introduction

Rehearing Requests

Severability of Rules

Several entities assert that the Commission should find that the requirements of open-access transmission and stranded cost recovery are not severable.[6] They argue that if one of these provisions is invalidated by a court or otherwise removed, the orders in their entirety should be withdrawn or stayed pending reconsideration by the Commission, and public utilities should be allowed to withdraw or file amended transmission tariffs.

Commission Conclusion

The Commission will not, at this time, make any determination whether or not the open-access transmission, stranded cost recovery and OASIS provisions of Order Nos. 888 and 889 are severable. Accordingly, we make no finding whether, if one of these provisions is invalidated, Order Nos. 888 and 889 should be withdrawn or stayed in their entirety. We believe that our decisions in Order Nos. 888 and 889 will be upheld by the courts. Moreover, it would be premature to consider the appropriateness of a stay or withdrawal at this time. Circumstances at the time of any court order would dictate how we should proceed and we would consider all such circumstances, and the entirety of our policy decisions, before determining how to respond to a court decision.

2. Functional Unbundling

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[6] *E.g.*, Nuclear Energy Institute, Southern, EEI. EEI and Nuclear Energy Institute also argue that Order No. 889 should not be severable.

In the Final Rule, the Commission found that functional unbundling of wholesale generation and transmission services is necessary to implement non-discriminatory open-access transmission.[7] At the same time, the Commission recognized that additional safeguards were necessary to protect against market power abuses. Thus, the Commission adopted a code of conduct, discussed in detail in the Final Rule on OASIS, to ensure that the transmission owner's wholesale power marketing personnel and the transmission customer's power marketing personnel have comparable access to information about the transmission system. The Commission also noted that section 206 of the FPA is available if a public utility seeks to circumvent the functional unbundling requirements.

As a further precaution against unduly discriminatory behavior, the Commission

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stated that it will continue to monitor electricity markets to ensure that functional unbundling adequately protects transmission customers. The Commission also indicated that it would continue to observe both the evolution of competitive power markets and the progress of the industry in adapting structurally to competitive markets. If it subsequently becomes apparent that functional unbundling is inadequate or unworkable in assuring non-discriminatory open-access transmission, the Commission indicated that it would reevaluate its position and decide whether other mechanisms, such as ISOs, should be required.

The Commission concluded that functional unbundling, coupled with these safeguards, is a reasonable and workable means of assuring that non-discriminatory open-access transmission occurs. In the absence of evidence that

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[7] FERC Statutes and Regulations, Regulations Preambles January 1991-June 1996 at pp. 31,654-56; mineo at pp. 57-61.

functional unbundling will not work, the Commission indicated that it was not prepared to adopt a more intrusive and potentially more costly mechanism—corporate unbundling—at this time.

Rehearing Requests

Several entities disagree with the Commission's decision to require functional unbundling of wholesale generation and transmission as a means of assuring non-discriminatory open-access transmission.[8] American Forest & Paper argues that utilities must be required to divest or spin-off their generating assets through operational unbundling or divestiture. It alleges that it was arbitrary and capricious, and not supported by evidence, for the Commission to rely on a monopolist's code of conduct to protect against monopoly abuses. Nucor asserts that a financial conflict of interest remains and that the Commission cannot monitor the exchanges of information between utility generation and transmission employees. It declares that a credible information disclosure requirement is needed that makes generation cost and production data visible to all participants on a same-time basis. NY Municipal Utilities also believes that the Commission did not go far enough and argues that the Commission should have required operational unbundling, at least for tight power pools.

Commission Conclusion

The Commission reaffirms its finding in the Final Rule that, based on the information available at this time, functional unbundling, along with the flexible safeguards discussed in the Final Rule, is a reasonable and workable means of assuring non-discriminatory open-access transmission. We see no need to adopt a more intrusive and potentially more costly approach at this time based on speculative allegations that functional unbundling may not

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[8] *E.g.*, American Forest & Paper, Nucor, NY Municipal Utilities.

work and that more severe measures may be needed. Indeed, despite a number of opportunities to do so, no entity has submitted any evidence suggesting that this less intrusive approach would not work. We do emphasize, however, that we have not adopted a rigid approach, but have indicated a willingness to monitor the situation and, if events require, reevaluate our decision and decide whether another mechanism may be more appropriate. Until we see evidence that functional unbundling will not work, we will continue to require functional unbundling, with the safeguards enumerated in the Final Rule and in Order No. 889.

3. Market-Based Rates

a. Market-Based Rates for New Generation

In the Final Rule, the Commission codified its determination in Kansas City Power & Light Company (KCP&L)[9] that the generation dominance standard for market-based sales from new capacity should be dropped.[10] The Commission explained that it had yet to find an instance of generation dominance in long-run bulk power markets and no commenter had presented any evidence to that effect. However, the Commission emphasized that it will not ignore specific evidence presented by an intervenor that a seller requesting market-based rates for sales from new generation nevertheless possesses generation dominance.

The Commission further clarified that dropping the generation dominance standard for new capacity does not affect the

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demonstration that an applicant must make in order to qualify for market-based rates for sales from its existing generating capacity.

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9 67 FERC ¶61,183, at p. 61,557 (1994).

10 *FERC Statutes and Regulations, Regulations Preambles January 1991-June 1996* at pp. 31,656-57; *mimeo* at pp. 63-66.

Rehearing Requests

Several entities take issue with the Commission's determination to drop the generation dominance standard for market-based sales from new capacity.[11] American Forest & Paper argues that the Commission should delay its decision until effective competition has been demonstrated to exist in all markets. SC Public Service Authority maintains that the Commission must determine on a case-by-case basis whether public utilities have market power (for both existing and new capacity). It further argues that the Commission must develop an analysis of structural conditions to use in assessing the potential for market power consistent with that used by DOJ and FTC in merger proceedings and that reflects the conditions of the industry. SC Public Service Authority also asserts that the Commission must require as a condition of market rates for sales in the bulk power market, which it defines to be limited to sales to integrated utilities, that the selling utility file rate cases with the Commission and the applicable state commissions to avoid subsidization by captive consumers.

TDU Systems alleges that the long-run bulk power market upon which the KCP&L decision was based is overly broad and ignores the distinction between firm power, which "entities subject to others' market power are most commonly in need of" and other bulk power services. TDU Systems take issue with the Commission's conclusion in KCP&L that large numbers of capacity offers from IPPs and QFs demonstrate that the market abounds with competitors. TDU Systems argues that the Commission's "assumption that large numbers of offers of power equate with large numbers of offers of firm power is questionable at best, and very likely incorrect."[12] Similarly, LEPA argues that the Commission

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[11] *E.g.*, American Forest & Paper, SC Public Service Authority, TDU Systems, LEPA, San Francisco.

[12] TDU Systems at p. 92.

ignored evidence submitted by LEPA in comments "that the transmission dominant utility still retained monopoly power over RQ [requirements] markets on which LEPA's members are dependent for their bulk power supply." Because the Commission ignored the RQ market and the evidence of concentration in that market, LEPA asserts that the Commission's decision is reversible error. LEPA further argues that the Commission ignored the undisputed testimony of LEPA's witness that reliability requirements constrain the geographic scope of the RQ market severely.

San Francisco argues that the burden to demonstrate affirmatively the absence of capacity constraints as a precondition to receiving authority to charge market-based rates for sales from new capacity should be upon public utility applicants, who possess the information concerning capacity constraints.

Commission Conclusion

We reaffirm our decision to codify the determination in KCP&L that the generation dominance standard for market-based sales from new capacity should be dropped. Petitioners have not presented any evidence that demonstrates generation dominance in long-run bulk power markets and, as discussed in Order No. 888, we have found no such evidence of generation dominance in any of the numerous market-based rate cases decided by the Commission since KCP&L. In addition, as described in Order No. 888, the Commission will consider evidence of generation dominance, including generation dominance that results from transmission constraints, when such evidence is presented by an intervenor in a market-based rate case in which a utility seeks market-based pricing associated with new capacity.

American Forest & Paper's argument that the Commission should delay codification of KCP&L until effective competition has been demonstrated to exist in all markets ignores the fact that we have eliminated the

generation dominance standard for market-based rates from new capacity only, and that the generation standard still applies to applications for market-based rates from existing generation. Other entities similarly argue that other markets in which utilities may sell power from new capacity may be highly

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concentrated with respect to generation, or that these utilities may otherwise be able to exert market power. Specifically, TDU Systems and LEPA express concern that the new policy may result in the exercise of market power over very specific bulk power products.

To allay these concerns, we note that eliminating the generation dominance showing applies only to sales from new capacity. It does not apply to entire classes of service or to specific products. In addition, the policy eliminates the showing only as a matter of routine in each filing. We reemphasize that the Commission will consider specific evidence of generation dominance associated with new capacity at the time the seller seeks market-based rates for the new capacity, including whether the addition of the new capacity, when combined with existing capacity, results in generation dominance. This clearly includes situations where existing sources of generation must be combined with new resources to produce a firm power supply. Where entry barriers are a concern, intervenors are free to raise the issue.

SC Public Service Authority also raises a number of concerns relating to the ability of utilities to exercise market power if they are permitted to sell new capacity at market-based rates. These concerns generally include how the Commission determines product and geographic markets, and the standards used to determine whether sellers can exercise market power. In response to these concerns, as noted above public utility owners of new capacity must still seek case-by-case approval before they can sell power from

new capacity at market-based rates and, as stated in the Final Rule, intervenors may present specific evidence that a seller requesting such market rates possesses generation dominance or otherwise has market power.[13] These requirements include considerations of transmission market power, whether other barriers to entry exist and whether there is evidence of affiliate abuse or reciprocal dealing.

b. Market-based Rates for Existing Generation

In the Final Rule, the Commission found that there is not enough evidence on the record to make a generic determination about whether market power may exist for sales from existing generation.[14] The Commission indicated that it would continue its case-by-case approach that allows market-based rates based on an analysis of generation market power in first tier and second tier markets.[15] The Commission further indicated that while it will continue to apply the first-tier/second-tier analysis, it will allow applicants and intervenors to challenge the presumption implicit in the Commission's practice that the relevant geographic market is bounded by the second-tier utilities.

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[13] We do not agree with entities that claim that our decision to rely on evidence raised by intervenors in particular cases with respect to transmission constraints improperly shifts the burden away from the utility, which has the greatest access to information concerning those constraints. Given that we have yet to see any evidence of generation dominance in long-term bulk power markets we do not believe that it is appropriate to burden all market-based rate applicants with significant information requirements as an initial matter. However, if an intervenor raises a specific factual concern with respect to a transmission constraint that may result in the exercise of market power in a particular case, we will examine those facts in a paper or formal hearing. In that context, the utility would be required to come forward with information sufficient to permit a full examination of the effect of the constraint on the applicant's ability to exercise market power.

[14] *FERC Statutes and Regulations, Regulations Preambles January 1991-June 1996* at p. 31,660; *mimeo* at pp. 73-75.

[15] *See, e.g., Southwestern Public Service Company*, 72 FERC ¶61,208, at p. 61,996 (1995), *reh'g pending*.

Finally, the Commission stated that it would maintain its current practice of allowing market-based rates for existing generation to go into effect not subject to refund.[16] To the extent that either the applicant or an intervenor in individual cases offers specific evidence that the relevant geographic market ought to be defined differently than under the existing test, the Commission indicated that it will examine such arguments through formal or paper hearings.

Rehearing Requests

No rehearing requests were filed with respect to this matter.

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B. Legal Authority

In the Final Rule, the Commission responded to commenters challenging the Commission's authority to require open access and reaffirmed its conclusion in the NOPR that it has the authority under the FPA to order wholesale transmission services in interstate commerce to remedy undue discrimination by public utilities.[59]

Rehearing Requests

Authority to Order Open-Access Tariffs

Union Electric challenges the Commission's authority to require wheeling based on arguments that: (1) the rule overlooks the fact that the *AGD* case[60] pertained to voluntary

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16 The Final Rule contained a typographical error in which the word "not" was erroneously omitted.

59 *FERC Statutes and Regulations, Regulations Preambles January 1991-June 1996* at pp. 31,668-79 and 31,686-87; mimeo at pp. 98-129 and 148-51.

60 *Associated Gas Distributors v. FERC*, 824 F.2d 981, 998 (D.C. Cir. 1987), *cert. denied*, 485 U.S. 1006 (1988) (*AGD*).

actions by the pipelines and the Commission's imposition of open-access requirements as a condition on permitting the desired authorizations; (2) the Commission incorrectly treats the *Otter Tail* case;[61] (3) the legislative histories of the NGA and FPA are different and the legislative history of the FPA does not support the Commission's authority to order wheeling; (4) the Commission made prior contrary statements to the U.S. Supreme Court [in its opposition to the grant of certiorari to review the *AGD* decision] about the nature of Commission authority to order open access and judicial construction of that authority in *AGD* and *Otter Tail*;" (5) as a matter of statutory construction, the Commission cannot rely on sections 205 and 206, which are silent as to wheeling, when sections 211 and 212 contain express wheeling provisions; (6) the four relevant cases recognized by the Commission indicate that the Commission may not directly or indirectly order a public utility to wheel or transmit energy for another entity under sections 205 and 206, notwithstanding the Commission's circumscribed ability to order wheeling under sections 211 and 212; (7) prior to the issuance of the Final Rule the Commission, with a full appreciation of the legislative history behind Part II, consistently held that it lacks the authority to order wheeling under FPA Part II; (8) the rule fails to assign "considerable importance" to the Commission's "longstanding interpretation of the statute in accordance with its literal language;" and (9) in legislative hearings preceding enactment of EPAct, the Office of the General Counsel acknowledged

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the limitations on the Commission's wheeling power.

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61 *Otter Tail Power Company v. FPC*, 410 U.S. 366 (1974) (Otter Tail).

Carolina P&L also challenges the Commission's authority to order open-access tariffs, arguing that: (1) *Otter Tail* specifically states: "So far as wheeling is concerned, there is no authority granted the commission under Part II of the Federal Power Act to order it, . . ."; (2) the *Richmond* and *FPL* cases[60] prohibit the Commission from doing indirectly what it cannot do directly; (3) the *AGD* case does not support the Commission's authority to order open access through the filing of generic tariffs—in *AGD* the Commission's authority was based on voluntary actions by the affected pipelines and there are substantial differences between the NGA and the FPA; (4) the legislative history of EPAct indicates that the Commission does not have the authority to mandate open access and can only order open access if section 211 procedures are followed—citing *NYSEG* and *FPL*; and (5) section 211 limits the Commission's authority to order open access on a generic basis—where a specific statute addresses an issue, a more general statute should not be read in a manner that conflicts with the specific statute.

PA Com argues that the Commission's reliance on *AGD* "impermissibly expands the limited holding of *AGD*" and the Commission improperly relied on sections 205 and 206 of the FPA to require open access generically—the Commission only has case-by-case jurisdiction.

VA Com declares that the plain meaning of the FPA and cases interpreting sections 206 and 211 show that the Commission does not have the authority to order industry-wide open access. FL Com and El Paso argue that the Commission only has limited authority to order wheeling and

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[60] *Richmond Power & Light Company v. FERC*, 574 F.2d 610 (D.C. Cir. 1978) (*Richmond*) and *Florida Power & Light Company v. FERC*, 660 F.2d 668 (5th Cir. 1981), *cert. denied sub nom. Fort Pierce Utilities Authority v. FERC*, 459 U.S. 1156 (1983) (*FPL*).

that the Commission has not made the required findings under section 211.[61]

Group Two Section 205 Filings

Union Electric argues that the requirement that Group 2 Public Utilities make section 205 filings is contrary to the voluntary filing scheme inherent in section 205.

Commission Conclusion

Overview

The fundamental legal question before us is the scope of the authority granted to the Commission in 1935 to remedy undue discrimination in interstate transmission services and whether that authority permits us sufficient flexibility to define undue discrimination in light of dramatically changed industry circumstances, in order to provide electricity customers the benefits of more competitively priced power. In the NOPR and Order No. 888, the Commission comprehensively examined case law and legislative history relevant to our authority to order open-access transmission services as a remedy for undue discrimination.[62] We also responded at length in Order No. 888 to arguments that questioned our authority to take this step.[63]

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61 We note that Indianapolis P&L also has made legal arguments regarding our authority to order wheeling under Order No. 888. However, it did so in a request for rehearing of a denial of its request for waiver of the Order No. 888 requirements, not in its request for rehearing of Order No. 888. Accordingly, we will address its arguments when we act on its request for rehearing of its waiver denial.

62 *FERC Statutes and Regulations, Regulations Preambles January 1991-June 1996* at pp. 31,668- 73; *mimeo* at pp. 98-112. Notice of Proposed Rulemaking and Supplemental Notice of Proposed Rulemaking, *FERC Statutes and Regulations* ¶32,514, at pp. 33,053-56 (1995).

63 *FERC Statutes and Regulations, Regulations Preambles January 1991-June 1996* at pp. 31,673- 79; mimeo at pp. 112-129.

On rehearing, as described above, only a few parties continue to question the Commission's authority. As a general matter their rehearings do not raise any arguments, cases, or legislative history not previously considered, and they do not convince us that our action in Order No. 888 is not within our authority under sections 205 and 206 of the FPA. We therefore reaffirm our determination that we have not only the legal authority, but the responsibility, to order the filing of non-discriminatory open-access tariffs if we find such order necessary to remedy

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undue discrimination or anticompetitive effects.

There are several broad points we wish to emphasize in response to the rehearings that have been filed:

First, there is no dispute that the FPA does not *explicitly* give this Commission authority to order, *sua sponte*, open-access transmission services by public utilities. However, the fact remains that the FPA does explicitly require this Commission to remedy undue discrimination by public utilities.[64] The finding of the D.C. Circuit in the *AGD* case, with regard to sections 4 and 5 of the NGA (which parallel sections 205 and 206 of the FPA), are equally applicable here: the Act "fairly bristles" with concerns regarding undue discrimination and it would turn statutory construction on its head to let the failure to grant a general power prevail over the affirmative grant of a specific one.[65]

Second, there also is no dispute that before Congress enacted the FPA in 1935, it rejected provisions that would have explicitly granted the Commission authority to order

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[64] *See FERC Statutes and Regulations, Regulations Preambles January 1991-June 1996* at pp. 31,669-70; mimeo at pp. 101-03. See *FERC Statutes and Regulations, Regulations Preambles January 1991-June 1996* at pp. 31,669-70; mimeo at pp. 101-03.

[65] 824 F.2d at 998.

transmission to *any* person if the Commission found it "necessary or desirable in the public interest." However, the fact that Congress rejected an extremely broad common carrier provision does not limit the remedies available to the Commission to enforce the undue discrimination provisions in the FPA.[66]

Third, entities on rehearing understandably have focused on statements in case law that indicate limits on the Commission's wheeling authority. They particularly focus on certain statements by the Supreme Court in *Otter Tail*. The Commission in Order No. 888 fully addressed and considered all relevant case law of which we are aware, including statements in *Otter Tail* and other court cases indicating limitations on our authority.[67] We do not dispute these statements and we recognize limitations on our authorities. However, the fact remains that *none* of the cases cited, including *Otter Tail*, involved the issue of whether this Commission can order transmission as a remedy for undue discrimination and *none* addressed industry-wide circumstances such as those before us in Order No. 888.

Fourth, while Congress in 1978 gave the Commission certain case-by-case authority to order transmission access by both public utilities and non-public utilities, and broadened this case-by-case authority in 1992, Congress also specifically provided in section 212(e) of the FPA that the case-by-case authorities were not to be construed as limiting or impairing any authority of the Commission under any other provision of law.[68] Indeed, the legislative history of

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[66] See *FERC Statutes and Regulations, Regulations Preambles January 1991-June 1996* at pp. 31,676-78; mimeo at pp. 120-27.

[67] See *FERC Statutes and Regulations, Regulations Preambles January 1991-June 1996* at pp. 31,668-73; mimeo at pp. 98-110.

[68] See *FERC Statutes and Regulations, Regulations Preambles January 1991-June 1996* at pp. 31,686-87; mimeo at pp. 148-49.

EPAct shows that when Congress amended the section 211-212 wheeling provisions and the section 212(e) savings clause in 1992,[69] it was well aware of arguments regarding the scope of the Commission's wheeling authority as a remedy for undue discrimination under section 206. Whereas Congress in 1992 decided to add a flat prohibition on the Commission ordering direct retail wheeling under *any* provision of the FPA, it did not add a prohibition on the Commission ordering wholesale wheeling to remedy undue discrimination under section 206. It instead retained and modified the savings clause. The issue before us, therefore, hinges on the scope of authority given to this Commission to remedy undue discrimination, not on the scope of authority given to us in 1978 and 1992.

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The Commission is significantly influenced by the decision and case law discussion by the D.C. Circuit in the *AGD* case. This court opinion contains the most recent and comprehensive discussion of the Commission's legal authority to remedy undue discrimination under NGA provisions that mirror those in the FPA, including the relevant case law concerning the Commission's authority to order transmission under the FPA.[70] The rehearing arguments do not, and we believe cannot, reconcile the *AGD* court's discussion and findings with a conclusion that the Commission cannot under any circumstances (as these

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[69] The savings clause in section 212(e) originally provided that no provision of section 210 or 211 shall be treated as "limiting, impairing, or otherwise affecting any authority of the Commission under any other provision of law." In 1992, the 212(e) savings clause was amended to provide that sections 210, 211 and 214 "shall not be construed as limiting or impairing any authority of the Commission under any other provision of law."

[70] *AGD*, 824 F.2d at 996-999. See also *FERC Statutes and Regulations, Regulations Preambles January 1991-June 1996* at pp. 31,668-73, 31,676-78; mimeo at pp. 98-110 and 120-27.

parties advocate) order wheeling under sections 205 and 206 to remedy undue discrimination.

In sum, we believe that the essential question of the Commission's legal authority to impose the requirements of Order No. 888 turns on the flexibility of the Commission's remedial authority under sections 205 and 206 of the FPA to remedy undue discrimination. As was true with respect to the natural gas industry, we acknowledge that Commission precedent for many years nurtured the expectation that we could not, under our authority under the FPA, preclude utilities from using their monopoly power over the nation's transmission systems to secure their monopoly position as power suppliers. However, as described at length in Order No. 888, these policies arose in the context of practical, economic, and regulatory circumstances that gave rise to vertically integrated monopolies and little, if any, competition among power suppliers. In this kind of regime, the interests of customers were most effectively served by the kind of cost-based regulatory regime that has prevailed until very recently. The evolution of third-party generation, facilitated by PURPA and significant technological advances, dramatically altered the economics of power production. The enactment of EPAct recognized these changes and established a national policy intended to favor the development of a competitive generation market, so that the efficiencies of the new marketplace will be available to customers in the form of lower costs for electricity. Utility practices that may have been acceptable a few years ago would, if permitted to continue, smother the fledgling competitive wholesale markets and undermine the efforts of customers to seek lower-price electricity. We firmly believe that our authorities under the FPA not only permit us to adapt to changing economic realities in the electric industry, but also require us to do so, if that is necessary to eliminate undue discrimination and protect electricity customers.

Specific Arguments[71]

The Factual Circumstances Underlying AGD Do Not Mandate a Different Conclusion in This Proceeding

Both Union Electric and Carolina P&L argue that the Commission cannot rely on *AGD* in support of its actions in the electric industry, and they attempt to distinguish the legal basis on which the Commission acted in requiring open-access transportation for gas pipelines. Specifically, they argue that *AGD* (Order No. 436 [*FERC Statutes and Regulations, Regulations Preambles 1982-1985* ¶30,665]) pertained to *voluntary* actions by gas pipelines and that the Commission's imposition of open-access requirements was a *condition* of certificate authorizations to transport gas, whereas the Commission's action in Order No. 888 is a direct mandate.[72] We believe this is a distinction without a difference. While it is true that the Commission required open access as a condition of granting blanket authorizations for pipelines and authorizations for pipelines authorizing pipelines to transport natural gas,[73] the critical point is that in both Order No. 436 and Order No. 888 the Commission's actions hinged as a legal matter on the parallel provisions of the NGA (sections 4 and 5) and the FPA (sections 205 and 206) that prohibit undue discrimination. Whether persons are seeking to transport natural gas or wheel electric power in interstate

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71 We do not repeat our lengthy legal analyses in Order No. 888, but discuss only those arguments that warrant further discussion.

72 See *Union Electric and Carolina P&L*.

73 These authorizations are issued under section 7 of the Natural Gas Act and section 311 of the Natural Gas Policy Act.

commerce, *by law* they must not unduly discriminate or grant undue preference.[74]

In *AGD*, the court upheld the Commission's reliance upon sections 4 and 5 of the NGA to impose an open-access commitment on any pipeline that secured a blanket certificate to provide gas transportation under section 7 of the NGA or provided transportation under section 311 of the NGPA.[75] Order No. 436 was not a simple order that relied on the "voluntary actions" of affected pipelines. As the court in *AGD* understood:

> The Order envisages a complete restructuring of the natural gas industry. It may well come to rank with the three great regulatory milestones of the industry.
>
> . . .
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> At stake is the role of interstate natural gas pipelines. Although they are obviously transporters of gas, they have until recently operated primarily as gas merchants. They buy gas from producers at the wellhead and resell it, mainly to local distribution companies ("LDCs") but also to relatively large end-users. The Commission has concluded that a prevailing pipeline practice—particularly their general refusal to transport gas for third parties where to do so would displace their own sales—has caused serious market distortions. It has found this practice "unduly discriminatory" within the meaning of §5 of the NGA. Order 436 is its response.
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> The essence of Order No. 436 is a tendency, in the industry metaphor, to "unbundle" the pipelines'

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[74] While there is a difference in the statutes in that natural gas transporters must obtain a certificate from the Commission before they can transport gas, there is *no* difference in the statutory standard applied to the interstate service.

[75] 824 F.2d at 997-98. The court also noted the Commission's reliance on section 16 of the NGA.

transportation and merchant roles. If it is effective, the pipelines will transport the gas with which their own sales compete; competition from other gas sellers (producers or traders) will give consumers the benefit of a competitive wellhead market.[76]

Indeed, since Order No. 436 issued, virtually all jurisdictional natural gas pipelines became "open access" transporters of natural gas.

In analyzing the Commission's authority to remedy undue discrimination, the court never made the distinctions now being put forth by Union Electric and Carolina P&L. Rather, the court specifically focused on the Commission's authority under section 5 of the NGA and upheld the Commission's authority to remedy undue discrimination in the transportation of natural gas by requiring pipelines transporting natural gas to do so on a non-discriminatory basis.[77] Similarly, the Commission in Order No. 888 found undue discrimination in the transmission of electric energy and required, pursuant to section 206 of the FPA (the FPA provision that parallels section 5 of the NGA), that if public utilities transmit electric energy in interstate commerce, they must do so on a non-discriminatory basis (i.e., offer non-discriminatory open-access transmission).

Moreover, while the Commission may have imposed a "condition" on pipelines obtaining blanket certificates or providing section 311 transportation in Order No. 436, this does not detract from the court's core finding in *AGD* that the Commission had the authority under section 5 of the NGA to remedy undue discrimination by requiring open-access

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[76] 824 F.2d at 993-94.

77 For example, as the *AGD* court explained with regard to its discussion of *Maryland People's Counsel v. FERC*, 761 F.2d 780 (D.C. Cir. 1985), "we made it clear that blanket-certificate transportation, unconstrained by any nondiscriminatory access provision, might well require remedial action under §5." 824 F.2d at 1000.

transportation.[78] The Commission chose in Order No. 436 to impose its open-access remedy as a condition to pipelines obtaining a blanket certificate to transport natural gas, but its authority was rooted in the undue discrimination provisions

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of section 5. Additionally, the practical result of the conditioning was that all jurisdictional pipelines would have to provide open-access transportation, a result that was clearly anticipated by the *AGD* court.[81] Thus, there is no distinction in the result intended, or the result achieved, in either industry; in both cases, the intent was to remedy undue discrimination pursuant to the statutes governing each industry, and in both cases the result was that all transporters/transmitters must agree to open-access non-discriminatory services if they seek to continue owning, controlling or operating monopoly interstate transportation facilities.

Legislative History Behind the FPA and EPAct Does Not Preclude Our Action

We disagree with the arguments that the legislative history behind Part II of the FPA establishes that the Commission cannot under any circumstance order wheeling under FPA

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[78] We disagree with Union Electric that anything in the Commission's brief to the Supreme Court, opposing certiorari of *AGD*, contradicts our conclusion. We recognize, as the Commission explained in that brief, that there is no equivalent to section 7 of the NGA in the FPA. While this puts Order No. 888 on a somewhat different factual basis from *AGD*, it has no material effect on whether we have the authority to remedy undue discrimination by requiring non-discriminatory open access transmission.

[81] *See* 824 F.2d at 993-94 ("The Order envisages a complete restructuring of the natural gas industry. It may well come to rank with the three great regulatory milestones of the industry. . . .").

sections 205 and 206.[82] We examined the legislative history of sections 205 and 206 at length in the NOPR and Order No. 888 and concluded that it supports our authority to order open-access transmission as a remedy for undue discrimination.[83] We also have examined the legislative history of the EPAct amendments to sections 211 and 212 and conclude that Congress in EPAct did not resolve the issue of our authority under sections 205 and 206 and left untouched whatever pre-existing authorities we had under these sections. The parties have raised nothing new on rehearing to persuade us that our interpretation is wrong. However, there are several arguments that we believe warrant further discussion.

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[82] Parties have raised the legislative history of sections 205 and 206, as well as the legislative history of the EPAct amendments to sections 211 and 212.

[83] *FERC Statutes and Regulations, Regulations Preambles January 1991-June 1996* at pp. 31,676- 78; *mimeo* at pp. 120-27. Notice of Proposed Rulemaking and Supplemental Notice of Proposed Rulemaking, *FERC Statutes and Regulations* ¶32,514, at pp. 33,053-56 (1995). Union Electric points to a statement in the Commission's 1987 brief to the U.S. Supreme Court, opposing certiorari of the *AGD* case; in that brief the Commission pointed out that the Supreme Court had noted, in *Otter Tail*, that the legislative histories of the FPA and NGA are "materially different." As we explained in Order No. 888, we have thoroughly reexamined the legislative histories of the NGA and FPA with respect to this issue and now conclude that there is no material difference as to this issue in the legislative histories of the two statutes. Further, such a difference, whether or not it exists, was not crucial to the fundamental holdings of the *AGD* court and does not preclude that decision from applying equally in the electric industry. *See FERC Statutes and Regulations, Regulations Preambles January 1991-June 1996* at pp. 31,676-78; *mimeo* at pp. 121-26. We also note that in its brief to the Supreme Court the Commission explicitly stated that neither *Otter Tail* nor any of the other electric cases cited "presented the question whether the Commission could order wheeling to remedy undue discrimination or anticompetitive behavior. . . ." FERC Brief at p. 25 (footnote omitted).

Parties on rehearing argue that the existence of sections 211 and 212 limit the Commission's wheeling authority and, in effect, remove our authority under section 206 to order any transmission as a remedy for undue discrimination.[84] We disagree. In enacting EPAct, Congress did not resolve the extent of our wheeling authority outside the context of sections 211 and 212.[85] As we explained above, while Congress in 1978 gave the Commission certain case-by-case authority to order transmission access, it also specifically provided in section 212(e) of the FPA that the case-by-case authorities were not to be construed as limiting or impairing any authority of the Commission under any other provision of law. Congress retained a similar savings clause when it amended sections 211 and 212 in 1992. Moreover, the legislative history of EPAct shows that when Congress amended sections 211 and 212, it was well

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aware of arguments regarding the scope of the Commission's remedial authority under section 206.[86] Whereas Congress added an amendment prohibiting the Commission from ordering direct retail wheeling under *any* provision of the FPA, it chose not to add a prohibition on the Commission ordering wholesale wheeling as a remedy for undue discrimination under sections 205 and 206.[87]

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84 *See* discussion *supra* concerning *AGD* court's understanding that Order No. 436 [*FERC Statutes and Regulations, Regulations Preambles 1982-1985* ¶30,665] was not a simple order that relied on voluntary actions of affected pipelines.

85 Contrary to certain assertions, in Order No. 888 we viewed the statute as a whole and determined that section 211 in no way limited the broad authority Congress gave us to eradicate undue discrimination in the electric power industry.

86 *See* note 71 and related discussion, *supra*.

87 In response to Carolina P&L's argument that Congress gave the Commission a specific remedy under section 211 and the Commission

We are not persuaded that this conclusion is wrong based on rehearing arguments that we ignored other legislative history of EPAct. Carolina P&L argues that we ignored various statements of Senator Wallop following the enactment of EPAct, which it alleges are counter to our claim of authority to order open-access transmission as a remedy for undue discrimination. The utility is simply in error that we ignored these statements. We explicitly mentioned Senator Wallop's statements in Order No. 888 and gave our rationale for why section 211 does not limit our authority to remedy undue discrimination.[88] However, we believe it is important to elaborate on the context in which those statements were made and our interpretation of those statements.

The primary focus of Senator Wallop's statements is on the transmission authority given by the EPAct amendments to sections 211 and 212. These statements emphasize restrictions on our section 211 wheeling authority, including the fact that section 211 does not give the Commission authority to order transmission access on its own motion or to order open-access transmission.[89] We do not quarrel with these statements because sections 211 and 212 clearly do place restrictions on our authority to order access under those

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should not presume that it has additional remedies in such a circumstance, we do not believe that section 211 can credibly be viewed either as a partial substitute for, or as superseding, the section 205-206 undue discrimination remedial authority that is fundamental to the Federal Power Act. Indeed, section 211 is not written in terms of providing remedial authority to address undue discrimination but rather provides for case-by-case transmission service on request if the service is in the public interest and meets the other criteria in sections 211 and 212.

[88] *FERC Statutes and Regulations, Regulations Preambles January 1991-June 1996* at pp. 31,686- 87; *mimeo* at pp. 148-51.

[89] Most of the statements talk in terms of "The Conference Report provides . . . ." and thus are referring only to the section 211 and 212 provisions. *See, e.g., 138 Cong. Rec. 517616 (Oct. 8, 1992).*

provisions. The statements also discuss the differences between the House introduced amendments to sections 211 and 212 (which would have provided broader and in some instances mandatory access authority) and the amendments that finally passed (which were more limited). We also do not disagree that changes were made to the bill that originally was introduced. At issue here, however, is not whether there are restrictions on our section 211 authority, but rather whether we have authority *outside the context of section 211* to order transmission as a remedy for undue discrimination. The only statement among Senator Wallop's remarks that addresses this specific issue is one in which he says, "*In my opinion*, neither the amendments made by this Act *nor existing law* give the FERC any authority to mandate open-access transmission tariffs for electrical utilities." (emphasis added). We do not view one senator's opinion as in any way dispositive of the issue. As discussed *supra*, when Congress enacted the 1992 section 211 amendments it was well aware of the outstanding legal issue of the Commission's authority to order access as a remedy for undue discrimination under section 206. It chose not to clarify this issue by prohibiting the Commission from ordering access, but instead retained the savings clause in section 212(e).

The issue of our legal authority thus turns on the undue discrimination authority given to us in 1935, and the legislative history of sections 205 and 206. We discussed this at length in Order No. 888.[90] On rehearing, several entities emphasize the *Otter Tail* case and the legislative history referred to in that case. In particular, Union Electric recites Justice Stewart's discussion of the legislative history in his partial dissent in *Otter Tail*. We do not interpret that discussion to suggest that we do not have the authority to

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90 *FERC Statutes and Regulations, Regulations Preambles January 1991-June 1996* at pp. 31,676- 78; *mimeo* at pp. 120-27.

remedy undue discrimination by requiring open-access transmission under any circumstance. As we explained in Order No. 888:

> In the FPA, while Congress elected not to impose common carrier status on the electric power industry, it tempered that determination by explicitly providing the Commission with the authority to eradicate undue discrimination—one of the goals of common carriage regulation. By providing this broad authority to the Commission, it assured itself that in preserving "the voluntary action of the utilities" it was not allowing this voluntary action to be unfettered. It would be far-reaching indeed to conclude that *Otter Tail*, which was a civil antitrust suit that raised issues entirely unrelated to our authority under section 206, is an impediment to achieving one of the primary goals of the FPA—eradicating undue discrimination in transmission in interstate commerce in the electric power industry.[91]

In response to Union Electric's arguments that Congress explicitly rejected common carrier provisions in 1935, we do not disagree with Union Electric's statement that "the mandatory wheeling language was not dropped inadvertently."[92] The point that we made in Order No. 888 (quoting *AGD*) in this regard was that

> (1) "Congress declined *itself* to impose *common carrier* status" (emphasis added) and (2) there is no "support for the idea that the Commission could under no circumstances whatsoever impose obligations encompassing the core of a common

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[91] *FERC Statutes and Regulations, Regulations Preambles January 1991-June 1996* at p. 31,670; *mimeo* at p. 103.

92 Union Electric at p. 26.

carriage duty." [93]

Nowhere did we ever suggest that the mandatory wheeling language was dropped inadvertently; we simply distinguish a general common carrier obligation imposed "in the public interest" from an obligation to provide transmission service deemed necessary to eliminate undue discrimination. Finally, we fully agree with Union Electric's statement that

> [a]lthough this "first Federal effort" occurred in 1935, the resulting FPA sections 205 and 206 have not been modified in any relevant respect since that time. Therefore, the range of authority conveyed to the Commission in such sections remains the same today as it did then.[94]

We never suggested otherwise and our conclusion in Order No. 888 is not based on a finding to the contrary.

Case Law Does Not Prohibit Our Ordering Wheeling Under Sections 205 and 206 of the FPA

Union Electric, discussing the very cases cited by the Commission in Order No. 888, asserts that "the Commission fails to recognize their dispositive results prohibiting it from ordering wheeling under the sections 205 and 206 of the FPA."[95] We thoroughly examined all of the case law cited by Union Electric, as evidenced by our discussions in the NOPR and Order No. 888, and disagree that any of those cases prohibit the Commission from ordering wheeling under sections 205 and 206 of the FPA to remedy undue

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[93] *FERC Statutes and Regulations, Regulations Preambles January 1991-June 1996* at p. 31,677; *mimeo* at p. 122.

[94] Union Electric at p. 27.

95 Union Electric at p. 30.

discrimination. Indeed, the *AGD* court reached the same conclusion.[96]

Union Electric further cites to a variety of FPC cases that it claims demonstrate that the Final Rule exceeds the Commission's statutory authority.[97] It appears to have proffered every negative Commission statement it could find with respect to our authority to order wheeling under Part II of the FPA. As in the Commission cases cited, we recognize that our authority to order transmission service is not unbounded; if we order transmission, it must be within the scope of authority available to us under the FPA. However, the fact is that none of the cases cited as establishing limits on the Commission's authority addresses the issue before us

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now, i.e., the Commission's authority to order transmission as a remedy for undue discrimination. Simply stated, the Commission has never before been faced with generic findings of undue discrimination in the provision of interstate electric transmission services, and the extent of its authority to remedy that undue discrimination.

The Commission's General Counsel Never Asserted, or Even Suggested, That the Commission Does Not Have the Authority to Order Wheeling as a Remedy for Undue Discrimination

Union Electric spends several pages of its rehearing request asserting that the Commission's own General Counsel has acknowledged the limitations on the

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96 The only relevant case the *AGD* court did not discuss was *NYSEG*. As we explained in Order No. 888, presumably this was because the case did not concern whether the Commission could order wheeling as a remedy for undue discrimination. *FERC Statutes and Regulations, Regulations Preambles January 1991-June 1996* at p. 31,672 n.217; *mimeo* at p. 108 n.217.

97 Union Electric at pp. 33-37.

Commission's authority to order wheeling.[98] In particular, it points to a statement by a Commission OGC witness that " 'if Congress intends for the Commission to be able to deal with transmission on its own motion and thereby go further than simply dealing with industry proposals,' Congress would need 'to include an affirmative statement somewhere in the Act that the Commission could require wheeling on its own motion.' "[99] This same statement was previously raised by EEI and previously addressed in Order No. 888. We do not disagree that this statement was made. However, it must be read in the context of the witness' entire testimony in which the witness stated *four* times the view that the case law supports the argument that the Commission has authority to order wheeling as a remedy for undue discrimination.[100] Indeed, contrary to Union Electric's assertion, the extensive legal analysis set forth by the Commission's witness supports the position relied upon in this proceeding.[101] Thus, viewed

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98 Union Electric at pp. 37-40.

99 Union Electric at pp. 38-39.

100 Hearings on H.R. 1301, H.R. 1543, and H.R. 2224 before the Subcommittee on Energy and Power of the House Committee on Energy and Commerce, 102d Cong., 1st Sess. (May 1, 2 and June 26, 1991), Statement of Cynthia A. Marlette, Associate General Counsel, Federal Energy Regulatory Commission, Report No. 102-60 at p. 60 ("However, as discussed below, there are strong legal arguments that the Commission's obligation to protect against undue discrimination carries with it the authority to impose transmission requirements as a remedy for undue preference or discrimination." "As discussed below, although the case law in this area has been uncertain, in OGC's opinion there is a strong legal argument that the Commission can require transmission as a remedy for undue preference or undue discrimination."); at pp. 69-70 ("The weight of the limited case law, particularly the *AGD* opinion, supports authority to order wheeling as a remedy for undue discrimination where substantial evidence exists."); at p. 106 ("I believe that we have substantial authority under the existing case law to mandate access where necessary to remedy anticompetitive effects.").

101 The statement quoted was preceded by a legal analysis of the Commission's authorities under then existing law, including section 206,

in the context of the witness' entire testimony. Union Electric's arguments to the contrary are unavailing. Moreover, nowhere did the witness ever suggest, as asserted by Union Electric, that FPA sections 205 and 206 could only be used "to eliminate unduly discriminatory terms in a wheeling arrangement voluntarily filed with the Commission."[102]

The Commission Has the Authority to Order Public Utilities to Make Rate Filings in This Proceeding

We reject Union Electric's argument that our requirement that Group 2 Public Utilities make section 205 filings is contrary to the voluntary filing scheme inherent in section 205. It is true that the Commission ordinarily cannot require a utility to make a section 205 filing. However, in this situation the section 205 filing was required as a remedy under section 206 of the FPA to establish rates for non-discriminatory open-access transmission. Acting pursuant to section 206 of the FPA, we found that undue discrimination exists in the wholesale transmission of electric power and ordered the filing of non-discriminatory open-access transmission tariffs to remedy this discrimination. Section 206 further requires that upon such a finding the Commission "shall determine the just and reasonable rate, charge, classification, rule, regulation,

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practice, or contract to be thereafter observed and in force . . . ." Thus, we had the authority to set the rates that would be

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and a statement that an examination of the Commission's *full* authorities might further open up the industry. Further, it was made in the context of case-by- case industry proposals and the Commission's inability to require case-by-case wheeling on its own motion. It did not address section 206 authority to remedy undue discrimination.

[102] Union Electric at p. 39. We note that Union Electric did not cite to any page or particular language to support its assertion.

observed and in force following the effectiveness of open-access transmission and initially proposed to set rates for each public utility. However, rather than take this intrusive approach, which necessarily would have required a number of generic assumptions and resulted in less than public utility-specific rates, upon issuance of the Final Rule, we chose to permit these public utilities to make section 205 filings to propose their own rates for the services provided in the *pro forma* tariff.

The Commission's Prior Failure to Order Wheeling as a Remedy for Undue Discrimination Is Not Dispositive

After discussing several cases that it asserts address the Commission's authority to remedy undue discrimination, Carolina P&L declares that "[p]erhaps the strongest evidence that the Commission lacks the power to compel wheeling under FPA section 206 is the fact that the Commission has never previously exercised this alleged power, despite numerous opportunities to do so."[103] However, the court in *AGD* succinctly dismissed a similar argument:

> It is finally argued that the Commission's not having imposed any requirements like those of Order No. 436 in the period from enactment in 1938 until the present demonstrates the lack of any power to do so. . . . But as our introductory review of the economic background sought to illustrate, the Commission here deals with conditions that are altogether new. Thus no inference may be drawn from prior non-use.[104]

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[103] Carolina P&L at pp. 35-36.

[104] 824 F.2d at 1001. In this regard, we acknowledge that our view of what constitutes undue discrimination has evolved significantly in light of the dramatic economic changes in the industry, as described briefly above and more fully in Order No. 888.

Undue Discrimination/Anticompetitive Effects [105]

A number of utilities and state commissions argue that the Commission lacks evidence to support a finding of undue discrimination.[106]

VA Com argues that the Commission failed to make a legally supportable finding of industry-wide undue discrimination: "FERC apparently drew a conclusion that there was undue discrimination in the NOPR without support and later accepted customers' allegations, without further inquiry, and relied on them in making its finding of industry-wide undue discrimination." (VA Com at pp. 2-3).

PA Com and Carolina P&L assert that allegations of undue discrimination do not form a sufficient basis to compel a generic rulemaking. Not coming forward with specific accusations and the identity of specific accusers, PA Com asserts, is unconstitutional as a deprivation of due process.

With regard to specific allegations of undue discrimination, SoCal Edison argues that the Commission inappropriately relied upon allegations involving SoCal Edison as evidence of undue discrimination. SoCal Edison asks that the Commission declare that it is not making a factual determination as to any particular allegation especially since prior to 1994 the Commission defined discrimination differently. Dalton similarly argues that the Commission has no basis for finding that Georgia Power Company is engaged in unlawful undue discrimination as to new or roll-over transmission services in the operation of the Integrated Transmission System in Georgia (ITS) under the ITS agreement. Moreover, Dalton argues, even if it is found that GPC acted in unduly discriminatory manner, it is not

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105 *FERC Statutes and Regulations, Regulations Preambles January 1991-June 1996* at pp. 31,682- 84; *mimeo* at pp. 136-42.

106 *E.g.*, El Paso, Union Electric, Carolina P&L, VA Com, FL Com, PA Com.

practical or lawful to order open-access tariff for new and roll-over services.

Finally, Carolina P&L argues that the comparability standard does not eliminate the "requirement" that parties must be similarly situated before discrimination is present, and that the Commission has not provided factual support for its implicit finding that public utilities and their native load customers are similarly

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situated to third parties. It cites *City of Vernon v. FERC*, 845 F.2d 1042 at 1045-46 (D.C. Cir. 1988), in support.

Commission Conclusion

As an initial matter, the Commission grants SoCal Edison's request for clarification that in Order No. 888 we did not make a factual determination as to any particular allegation of past discrimination described in the Final Rule.[107] However, we reject arguments that the Commission cannot rely in part on the array of allegations and circumstances raised by customers in individual cases over the years and brought forth in response to the NOPR. The specific allegations are illustrative. However, they present examples of the types of discriminatory incentives and behavior inherent in ownership of monopoly transmission facilities, and also present credible examples of the types of discriminatory behavior in which public utilities could engage in the future. We also reject arguments that customers and the Commission must litigate and make specific findings of discrimination against each public utility before we can

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[107] In response to PA Com's and Carolina P&L's assertions that not coming forward with specific accusations and identities of specific accusers is unconstitutional and a deprivation of due process, we emphasize that the Commission has not denied due process to anyone. The Final Rule does not, nor is it intended to, make specific findings as to any particular utility or any particular allegation raised.

take any action to preclude discriminatory behavior that will harm competition and, ultimately, electricity consumers. This is particularly true where the discriminatory behavior clearly is in the economic self-interest of a monopoly transmission owner facing the markedly increased competitive pressures that are driving today's electric utility industry. As we recognized in Order No. 888,

> [t]he inherent characteristics of monopolists make it inevitable that they will act in their own self-interest to the detriment of others by refusing transmission and/or providing inferior transmission to competitors in the bulk power markets to favor their own generation, and it is our duty to eradicate unduly discriminatory practices. As the *AGD* court stated: "Agencies do not need to conduct experiments in order to rely on the prediction that an unsupported stone will fall."[108]

We believe that the same general discriminatory circumstances that faced us when we required open-access transportation in the natural gas industry[109] are also before us today in the electric industry. First, it is uncontested that market power continues to exist in the ownership and operation of the monopoly-owned facilities that comprise the nation's interstate transmission grid. Second, utilities, as a general matter, did not in the past offer comparable transmission services to competitors or to customers. Open-access services simply were not made available by utilities until the late 1980s when the Commission began to impose open access as a condition of approval of market-based rates and utility mergers in order to mitigate market power and remedy anticompetitive effects. Rather, the vast majority of

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[108] *FERC Statutes and Regulations, Regulations Preambles January 1991-June 1996* at p. 331,682; *mimeo* at pp. 136-37.

[109] *See AGD*, 824 F.2d at 999-1000.

utilities historically have declined to transport electric energy that would compete with their own sales or have offered access that is inferior to what they use for their own sales. Third, discrimination in transmission services, when viewed in light of utilities' own uses of their transmission systems compared to what they offer third parties, has denied and will continue to deny customers access to electricity at the lowest reasonable rates. The entities on rehearing have raised nothing to persuade us that it is in the interests of consumers to maintain the self-evident incentives for transmission owners to exercise their monopoly power over transmission to discriminate in favor of their own generation sales—incentives that will only increase in the future as competitive pressures continue to escalate.

The Commission addressed the same argument as that being made by Carolina P&L, that the Commission has not made the requisite finding that third-party transmission customers are similarly situated to public utilities and their native load customers, in 1994 in the *NEPOOL*

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and *AEP* cases.[110] In these cases, we recognized that the traditional focus of our undue discrimination analysis had been whether factual differences justify different rates, terms and conditions for similarly situated customers, but concluded that due to changing conditions in the electric utility industry, it was necessary to reevaluate our traditional analysis. As we stated in *NEPOOL*, the focal point of undue discrimination claims has shifted from claims of undue discrimination in rates and services which the utility offers different customers to claims of undue discrimination in rates and services which the utility offers when compared to its

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[110] *New England Power Pool*, 67 FERC ¶61,402 (1994) (*NEPOOL*); *American Electric Power Service Corporation*, 64 FERC ¶61,279 (1993), *reh'g granted*, 67 FERC ¶61,168, *clarified*, 67 FERC ¶61,317 (1994) (*AEP*).

own use of the transmission system.[111] "In this context, framing the analysis in terms of how a public utility treats similarly situated customers is not applicable or instructive."[112] The Commission concluded that it therefore must reexamine its application of the standard for undue discrimination claims under sections 205 and 206 of the FPA.

The Commission further elaborated on its re-examination of undue discrimination in *AEP*. The Commission cited its *NEPOOL* discussion and set for hearing the different uses that AEP made of its transmission system and whether there were any operational differences between any particular use that AEP made of the system and the use third parties might need, and, in particular, the degree of flexibility AEP accorded itself in using its transmission system for different purposes. The Commission subsequently set the same issue for hearing in several other cases.[113] In the NOPR, however, the Commission concluded that based on what it had learned in the ongoing cases, it would address this issue generically in this rulemaking. We announced in the NOPR our belief that all utilities use their own systems in two basic ways: to provide themselves point-to-point transmission service that supports coordination sales, and to provide themselves network transmission service that supports the economic dispatch of their own generation units and purchased power resources (integrating their resources to meet their internal load). Third parties may need one or both of these basic uses in order to obtain competitively priced generation or to have the opportunity to be competitive sellers of power, and the Commission proposed that all

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111 67 FERC ¶61,042, at p. 61,132.

112 *Id.*

113 *Commonwealth Edison Co.*, 70 FERC ¶61,204 (1995); *Wisconsin Electric Power Co.*, 70 FERC ¶61,074 (1995); and *Wisconsin Public Service Corp.*, 70 FERC ¶61,075 (1995).

public utilities must offer both services on a non-discriminatory open-access basis.[114]

We affirmed this determination in the Final Rule. We concluded that a public utility must offer transmission services that it is reasonably capable of providing, not just those services that it is currently providing to itself or others. Because a public utility that is reasonably capable of providing transmission services may provide itself such services at any time it finds those services desirable, it is irrelevant that it may not be using or providing that service today.[115] Thus, based on the analysis in this record, the Commission has determined that undue discrimination in the provision of transmission services in today's industry does not turn on whether utilities and their native load customers are similarly situated to third parties, but instead turns on whether the utility is providing comparable service, that is, service that it is reasonably capable of providing to other users of the interstate transmission system.

In short, the Commission is not bound to a static application of its undue discrimination analysis under the FPA and, indeed, has a public interest responsibility to reexamine undue discrimination in light of changed circumstances in the industry.[116] That is what we began in *NEPOOL* and *AEP* and have completed in this rulemaking. The traditional "similarly

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114 *FERC Statutes and Regulations* ¶32,524, at p. 33,079.

115 *FERC Statutes and Regulations* at p. 31,690; *mimeo* at p. 160.

116 There is no "requirement" in the FPA that the Commission apply a "similarly situated" test. Carolina P&L's reliance on *City of Vernon* is misplaced. That case involved a claim of discrimination in the type of service offered to a wholesale customer versus that offered to retail customers, and the Commission's application of the "similarly situated" and "same service" test. Contrary to Carolina P&L's implication, the case does not hold that the Commission is bound to apply a "similarly situated" test in analyzing undue discrimination claims under the FPA.

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situated" test, while applicable to discrimination among third-party customers, simply is not applicable when analyzing discrimination between third-party transmission customers and transmission owners. Under Carolina P&L's theory, presumably the only customers that could be shown to be similarly situated would be those who own monopoly transmission facilities and have native load (i.e., captive) customers. This would preserve customer captivity, perpetuate monopoly power and profits, and deny the lowest reasonable rates to consumers. We therefore reject Carolina P&L's arguments.

Moreover, the fact that public utilities and their native load customers have been treated differently from third-party transmission customers because they are not among those traditionally considered to be "similarly situated" is precisely the target at which Order No. 888 takes aim. Historically, competitively-priced power was not broadly available to wholesale customers because the industry was dominated by vertically integrated IOUs[117] and, to the extent cheaper generation alternatives were available in the marketplace, transmission owners either took the cheaper power for their own uses or purchased and re-sold it at a profit.[118] Prior to EPAct, most power customers took power from the vertically integrated utilities that provided their transmission service. Transmission-only transactions played a secondary role in bulk power markets, facilitating certain economy transactions and coordination and pooling arrangements that improved

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[117] *I.e.*, investor-owned utilities that owned generation, transmission and distribution facilities and most of whom had captive customers.

[118] Very simply, the transmission owner was able to prevent third parties from achieving the maximum savings possible in the generation market by withholding or delaying transmission service. Alternatively, the transmission owner could purchase the power and resell it to the third party at a rate that reflected a mark-up from the first power sale.

utility operational efficiencies, largely as a complement to bundled bulk power transactions. Given the predominantly vertically-integrated industry and efficiencies that could be gained through encouragement of coordination and pooling transactions, the Commission was willing to accept utility practices that provided third parties with transmission services that were distinctly inferior to the utility's own uses of the transmission system.

In the future, however, unbundled transmission service will be the centerpiece of a freely traded commodity market in electricity, in which all wholesale customers can shop for power. In a market characterized by a significant increase in non-vertically integrated power suppliers and competitively priced power that is now meaningfully available, it is no longer in the interest of wholesale customers for the Commission to tolerate the types of practices that were previously accepted. We cannot allow what have become unduly discriminatory practices to erect barriers between customers and the rapidly emerging competitive electricity marketplace. Accordingly, a primary goal of Order No. 888 is to provide that in the future transmission providers and third-party transmission customers are "similarly situated" in the quality of transmission service available to them.

C. Comparability

1. Eligibility to Receive Non-discriminatory Open-Access Transmission

In the Final Rule, the Commission modified the definition of "eligible customer" and, among other things, clarified that any entity engaged in wholesale purchases or sales of electric energy, not just those "generating" electric power, is eligible.[119] The Commission also clarified that entities that would violate section 212(h) of the FPA

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[119] *FERC Statutes and Regulations, Regulations Preambles January 1991-June 1996* at pp. 31,688- 90; *mimeo* at pp. 154-58.

(prohibition on Commission-mandated wheeling directly to an ultimate consumer and sham wholesale transactions) are not eligible. Further, the Commission clarified that foreign entities that otherwise meet the eligibility criteria may obtain transmission services. The

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Commission also provided for service to retail customers in circumstances that do not violate FPA section 212(h). Persons that would be eligible section 211 applicants also would be eligible under the open-access tariff.

a. Unbundled Retail Transmission and "Sham Wholesale Transactions"

Rehearing Requests

Several entities assert that there is an inconsistency between tariff language and preamble language and argue that section 1.11 of the tariff should be made consistent with the preamble to ensure that, absent a state-approved program, retail wheeling is not available under the tariff, no matter which party requests service.[120] They maintain that the limitation in section 1.11 that the transmission provider only must provide retail transmission service voluntarily or under a state-approved program appears to apply only when a retail customer is the purchaser, not when the transmission purchaser is an electric utility. They suggest the following language to remedy the problem: "however, such entity is not eligible for transmission service that would be prohibited by sections 212(h)(1) and/or 212(h)(2) of the Federal Power Act, unless such service is provided pursuant to a state retail access program or pursuant to a voluntary offer of unbundled retail transmission service by the Transmission Provider." (PSE&G at p. 22; Carolina P&L at pp. 8-9).

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120 *E.g.*, SoCal Edison, PSE&G, Carolina P&L.

Detroit Edison argues that the Commission should modify the definition to exclude any reference to transmission service provided to retail customers so as to avoid confusion and possible forum shopping. At the least, Detroit Edison argues, the Commission should modify the language to state that transmission service is available to an ultimate consumer to the extent, and only to the extent, that the service is authorized by a lawful state retail access program or pursuant to a voluntary offer of unbundled retail transmission service by the transmission provider.

NYSEG asserts that the Commission did not apply the section 212(h) limitation to service to retail customers under the tariff. NYSEG requests that the Commission clarify that it will not require retail wheeling beyond the scope of state-mandated retail access programs or beyond the terms of a transmission provider's voluntary offer of retail wheeling service.

Oklahoma G&E asks the Commission to clarify that the term eligible customer differentiates between a customer eligible to receive transmission service and a customer whose transaction is a sham or would result in mandatory retail wheeling and would therefore be prohibited by section 212(h).

NYSEG further asserts that the right of first refusal provision would permit a retail customer receiving wheeling service to continue to take that service upon expiration of its contract, which could require the transmission provider, in violation of section 212(h), to continue retail wheeling beyond the scope of its voluntary offer of service or beyond the scope of a state-mandated retail access program.

SoCal Edison argues that the Commission cannot compel a utility to supply retail transmission service if the utility challenges the authority of the state to require retail wheeling and section 1.11 should be revised to reflect this.

IL Com declares that it "does not recognize FERC's claim of jurisdiction over retail transmission service provided directly to a retail customer and disputes that unbundled retail wheeling directly to a retail customer is a service provided in interstate commerce." (IL Com at p. 35). Thus, "if FERC's proposed 'deference' to states is to be given any effect, states must be allowed to determine whether the retail transmission component of the retail wheeling program will be provided pursuant to the utility's existing filed wholesale tariff or whether the retail transmission will be provided pursuant to a 'separate retail transmission tariff' that is different from the wholesale tariff." (IL Com at p. 36). IL Com concludes that it is inappropriate (and illegal if FERC is overturned on its retail transmission jurisdiction assertion) to include retail customers taking final delivery of unbundled power for their own end-uses under retail wheeling programs as eligible customers.

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PA Com argues that it is relevant whether a customer is receiving retail or wholesale service and redefining transmission and local distribution service does not automatically convey jurisdiction to the Commission.

CCEM asks that the Commission clarify that a retail customer eligible to seek transmission service should be able to seek transmission service not only from the transmission provider, but from any other transmission provider. CCEM also asks that the Commission add the word "ultimate" before the word transmission provider in section 1.11 of the tariff.

EEI asks the Commission to "clarify that the transmission service provider should be allowed to supplement the terms and conditions of the *pro forma* tariff with additional provisions that specifically relate to the *totality* of the transmission service being provided, including the use of distribution facilities and any other transmission

facilities not currently included in wholesale rates." (EEI at p. 24 (emphasis in original)).[121]

Union Electric argues that a literal reading of the eligibility definition could require retail wheeling by utilities in states other than those required to participate in a particular retail wheeling program.

Commission Conclusion

The Commission agrees with those entities that argue that section 1.11 of the *pro forma* tariff does not explicitly prohibit "sham wholesale transactions" that could currently be arranged under the tariff by a utility applying for service and designating the retail customer as a point of delivery. We therefore have modified section 1.11 to clarify that, with respect to service that we are prohibited from ordering by section 212(h) of the FPA (whether direct retail wheeling or "sham" wholesale wheeling), otherwise eligible entities may obtain such service under the tariff only if it is pursuant to a state requirement that such service be provided or pursuant to a voluntary offer of such service. We also have modified the language to clarify that eligibility for unbundled direct retail service required by a state applies only to service from transmission providers that the state orders to provide the service. The modified language states:

> Eligible Customer: (i) Any electric utility (including the Transmission Provider and any power marketer), Federal power marketing agency, or any person generating electric energy for sale for resale is an eligible customer under the tariff. Electric energy sold or produced by such entity may be electric energy produced in the United States, Canada, or Mexico. However, with respect to transmission service that the Commission is prohibited from ordering by section 212(h) of the Federal Power

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121 *See also CSW Operating Companies.*

> Act, such entity is eligible only if the service is provided pursuant to a state requirement that the Transmission Provider offer the unbundled transmission service, or pursuant to a voluntary offer of such service by the Transmission Provider. (ii) Any retail customer taking unbundled transmission service pursuant to a state requirement that the Transmission Provider offer the transmission service, or pursuant to a voluntary offer of such service by the Transmission Provider, is an eligible customer under the tariff.

Regarding SoCal Edison's argument, the Commission stated in the Final Rule:

> Moreover, we are mindful of the fact that we are precluded under section 212(h) from ordering or conditioning an order on a requirement to provide wheeling directly to an ultimate consumer or sham wholesale wheeling. We therefore clarify that our decision to eliminate the wholesale customer eligibility requirement does not constitute a requirement that a utility provide retail transmission service. Rather, we make clear that if a utility chooses, or a state lawfully requires, unbundled retail transmission service, such service should occur under this tariff unless we specifically approve other terms.[122]

Therefore, the Commission is not compelling a utility to provide unbundled retail transmission service.[123] Rather, the Commission

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[122] *FERC Statutes and Regulations, Regulations Preambles January 1991-June 1996* at pp. 31,689- 90; *mimeo* at p. 158.

123 We also disagree with NYSEG's assertion that the right of first refusal provision would permit a retail customer receiving wheeling service to continue to receive service after the expiration of its contract and could require the transmission provider to continue wheeling beyond

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requires that should such service be provided, either pursuant to state mandate or voluntarily, it must be provided pursuant to the *pro forma* tariff unless the Commission approves alternative terms and conditions.

However, in light of CCEM's request that we clarify that a retail customer eligible to seek transmission service under the tariff should be able to seek service not only from the transmission provider, but also from any other transmission provider, and in light of Union Electric's concerns regarding retail service eligibility, we believe certain clarifications of our jurisdiction and of the statements made in Order No. 888 are necessary. The statements cited above that were made in Order No. 888 and the eligible customer tariff definition in (ii) above refer to direct retail transmission, i.e., the transmission of electric energy "directly" to an ultimate consumer. The Commission is prohibited by section 212(h)(1) of the FPA from ordering this type of retail transmission and that is why customers are eligible for such transmission under the tariff only if the transmission is pursuant to a state order or is provided voluntarily. However, on its face, section 212(h) does not prohibit the Commission from ordering public utilities to provide "indirect" unbundled retail transmission in interstate commerce, i.e., the transmission necessary to transmit unbundled electric energy to a utility that ultimately will deliver the energy to a customer that is purchasing the unbundled energy at retail either pursuant to a state retail access order or pursuant to voluntary delivery by the local utility.

We clarify that we believe we have the jurisdiction under the FPA to order indirect retail transmission to an ultimate

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the scope of its voluntary offer of service or beyond the scope of a state-mandated retail access program. Section 212(h) of the FPA would override any provision, including the right of first refusal provision, that may be included in the *pro forma* tariff.

consumer and that if the Commission under sections 205, 206 or 211 of the FPA orders such transmission, entities that otherwise qualify as eligible customers under the tariff will take transmission service for such indirect retail wheeling pursuant to the *pro forma* tariff. We note that the Commission may order such transmission on a case-by-case basis or may determine to do so generically in the future. We expect public utilities to provide such indirect retail access under the *pro forma* tariff and, if they do not, we will not hesitate to order them to do so.

In response to IL Com's argument that it does not recognize this Commission's claim of jurisdiction over the rates, terms and conditions of unbundled retail transmission that is provided directly to an ultimate consumer, the Commission reaffirms its legal conclusion set forth in the Final Rule.[124] As to its claim that we should give deference to the state as to whether such service could be taken under the wholesale tariff or a separate retail tariff on file with the Commission, we reaffirm our conclusion to address this on a case-by-case basis. Since the Final Rule issued, the Commission has addressed this in several orders. In *New England Power Company*, the Commission stated:[125]

> As we explained in the Open Access Rule and in the New Hampshire Interim Order, we generally expect retail transmission customers to take service under the same Commission tariff that applies to wholesale customers. While we generally will defer

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[124] *FERC Statutes and Regulations, Regulations Preambles January 1991-June 1996* at p. 31,780 and appendix G (at pp. 31,966-81); *mimeo* at p. 428 and appendix G.

[125] 75 FERC ¶61,356 at p. 62,141, *order on reh'g*, 77 FERC ¶61,135 (1996). In the order on rehearing, the Commission permitted a separate retail tariff to remain in effect for the duration of the retail electric pilot programs established in Massachusetts by Massachusetts Electric Company.

> to state requests for a separate retail tariff to accommodate the design and special needs of a state retail access program, the Massachusetts Commission has made no such request in this case.[15]

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[15] *See* Open Access Rule, *FERC Statutes and Regulations*, at p. 31,784; *New Hampshire Interim Order*, 75 FERC at p. 61,687 & n.3 (both noting that such a separate retail tariff must

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be consistent with the Commission's open-access policies and comparability principles) . . . .

Subsequently, in *New England Power Company*, 76 FERC ¶61,008 (1996), the Commission granted a limited waiver of the Open Access Rule requirements for the New Hampshire retail electric competition pilot project. Specifically, the Commission waived the requirement for individual service agreements, and the requirement for customer deposits. The Commission further announced that:

> other public utilities that provide unbundled retail service under a *pro forma* tariff do not need to apply to retail customers the tariff provisions regarding individual service agreements or customer deposits, unless a state retail program so requires. [126]

Concerning EEI's request for clarification, the Commission stated in the Final Rule:

> all tariffs need not be "cookie-cutter" copies of the Final Rule tariff. Thus, under our new procedure, ultimately a tariff may go beyond the minimum elements in the Final Rule *pro forma* tariff or may account for regional, local, or system-specific

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[126] 76 FERC at p. 61,024.

> factors. The tariffs that go into effect 60 days after publication of this rule in the *Federal Register* will be identical to the Final Rule *pro forma* tariff; however, public utilities then will be free to file under section 205 to revise the tariffs, and customers will be free to pursue changes under section 206. [127]

Utilities are free to include customer-specific terms and conditions or terms and conditions limited to certain customers (*e.g.*, a distribution charge) in the customer's service agreement and/or the network customer's network operating agreement.

b. Transmission Providers Taking Service Under Their Tariff

Rehearing Requests

TAPS states that section 1.11 does not seem to require a transmission provider to take service for its purchases, but the preamble does (citing *mimeo* at pp. 57, 191, 266 and regulatory text in section 35.28(c)(2)). It argues that transmission providers should be required to treat their own usage of the transmission system to serve retail customers under the network service provisions of the tariff. TAPS argues that this result could be achieved through an ISO or by requiring transmission providers to abide by all non-price terms of Parts I and III of the tariff. TAPS also argues that the rates charged network customers must be developed on the same basis as the transmission component of retail rates. It states that the transmission provider's purchases would then be made under Part III of the tariff to the extent they are made for serving retail customers. It further asserts that the Commission's authority and obligation to consider transmission owners' service to retail load in establishing wholesale transmission rates has been long established. At

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[127] *FERC Statutes and Regulations, Regulations Preambles January 1991-June 1996* at p. 31,770 n.514; *mimeo* at p. 399 n.514.

the least, TAPS argues that the Commission should require that a transmission provider take its wholesale purchases under some tariff.

Similarly, Coalition for Economic Competition asks the Commission to clarify that the requirement to use the *pro forma* tariff for wholesale purchases and to functionally unbundle wholesale purchases and sales does not apply to purchases made solely to serve retail customers on a bundled basis. It asserts that there is conflicting language in Order No. 888 (citing *mimeo* at p. 191) and Order No. 889 (citing *mimeo* at p. 12) and the *pro forma* tariff. Coalition for Economic Competition asserts that the Commission does not have jurisdiction over transmission that is part of a bundled retail sale.

Commission Conclusion

Several parties have noted on rehearing that there is conflicting language among the Final Rule, Order No. 889 and the *pro forma* tariff as to whether and to what extent the transmission provider must take service for "wholesale purchases" under its own tariff. As discussed below, we clarify that a transmission provider does not have to "take service" under its own tariff for the transmission of power

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that is purchased on behalf of bundled retail customers.

In a situation in which a transmission provider purchases power on behalf of its retail native load customers, the Commission does not have jurisdiction over the transmission of the purchased power to the bundled retail customers insofar as the transmission takes place over such transmission provider's facilities,[128] and therefore the *pro*

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[128] To the extent the transmission takes place on the interstate facilities of other public utilities, we would have jurisdiction over such transmission.

forma tariff does not have to be used for such transmission. Moreover, we recognize that purchases made collectively on behalf of native load[129] cannot necessarily be identified as going to any particular customer. However, the Commission does have jurisdiction over transmission service associated with sales to any person for resale, and such transmission must be taken under the transmission provider's *pro forma* tariff.[130]

Order No. 888, relying on the principle of comparability, established the terms and conditions for network service provided to network customers under the *pro forma* tariff. Network customers may include the transmission provider itself as well as any other entity receiving Network Integration Service. If the transmission provider purchases energy from another power supplier in order to make sales to its wholesale native load customers, it must take the transmission service necessary to transmit the power from its point(s) of receipt to its point(s) of delivery under the same terms and conditions as other Network Customers.[131] As we explained in *AES Power, Inc.*, network customers are entitled to make economy energy purchases from non-designated

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[129] Native load means "[t]he wholesale and retail power customers of the Transmission Provider on whose behalf the Transmission Provider, by statute, franchise, regulatory requirement, or contract, has undertaken an obligation to construct and operate the Transmission Provider's system to meet the reliable electric needs of such customers." Section 1.19 of the *pro forma* tariff.

[130] All transmission in interstate commerce by a public utility in conjunction with a sale for resale of electric energy is jurisdictional and must be taken under a FERC-jurisdictional tariff. The same is true for all unbundled transmission in interstate commerce to wholesale customers, as well as to unbundled retail customers.

[131] Under the Order No. 888 *pro forma* tariff, third-party wholesale customers have the ability to obtain the identical service the transmission provider provides itself when it engages in a sale of electric energy for resale. This may include network or point-to-point service.

network resources at no additional charge on a basis comparable to the economy energy purchases made by the transmission provider on behalf of its bundled retail customer.[132] This applies to the transmission provider as a network transmission customer under its own tariff as well as to other network transmission customers that make economy energy purchases on behalf of their customers. Thus, insofar as all wholesale transmission customer usage is concerned, third-party network customers are treated the same as the transmission owner.

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8. Consequences of Functional Unbundling

a. Distribution Function

In the Final Rule, the Commission concluded that the additional step of functionally unbundling the distribution function from the transmission function is not necessary at this time to ensure non-discriminatory open-access transmission.[155]

Rehearing Requests

No requests for rehearing addressed this matter.

b. Retail Transmission Service

In the Final Rule, the Commission explained that although the unbundling of retail transmission and generation, as well as wholesale transmission and generation, would be helpful in achieving comparability, it did not

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[132] 69 FERC ¶61,145, at p. 62,300 (1994) (proposed order), 74 FERC ¶61,220 (1996) (final order).

[155] *FERC Statutes and Regulations, Regulations Preambles January 1991-June 1996* at p. 31,699; *mimeo* at p. 186.

believe it was necessary.[156] The Commission further explained that the matter raises numerous difficult jurisdictional issues that are more appropriately considered when the Commission reviews unbundled retail transmission tariffs that may come before the Commission in the context of a state retail wheeling program.

Rehearing Requests

CCEM argues that all transmission must be unbundled, including currently bundled retail transmission service, because failure to do so is inconsistent with the Commission's assertion of jurisdiction over the rates, terms, and conditions of unbundled interstate transmission to retail customers and authority to address retail stranded costs through its jurisdiction over such costs. CCEM notes that the Commission found it necessary in Order No. 636 to unbundle the pipeline's direct retail sales to achieve comparability (CCEM cites *FPC v. Conway Corp.*, 426 U.S. 271, 273 (1976) and *Mississippi River Transmission Corp. v. FERC*, 969 F.2d 1215 (D.C. Cir. 1992) for the proposition that the Commission has jurisdiction over all interstate transmission).

NY Municipal Utilities and American Forest & Paper also argue that the Commission erred in not requiring the unbundling of the transmission component of *retail* sales. American Forest & Paper believes that such unbundling will facilitate competition by making the generation price transparent to all participants.

Commission Conclusion

We disagree with those entities that argue that the Commission erred in not requiring the unbundling of all transmission service, including the unbundling of transmission from retail service. As we explained in the Final Rule:

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[156] *FERC Statutes and Regulations, Regulations Preambles January 1991-June 1996* at pp. 31,699- 700; *mimeo* at p. 188.

> when transmission is sold at retail as part and parcel of the delivered product called electric energy, the transaction is a sale of electric energy at retail. Under the FPA, the Commission's jurisdiction over sales of electric energy extends only to wholesale sales. However, when a retail transaction is broken into two products that are sold separately (perhaps by two different suppliers: an electric energy supplier and a transmission supplier), we believe the jurisdictional lines change. In this situation, the state clearly retains jurisdiction over the sale of the power. However, the unbundled transmission service involves *only* the

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> provision of "transmission in interstate commerce" which, under the FPA, is exclusively within the jurisdiction of the Commission. Therefore, when a bundled retail sale is unbundled and becomes separate transmission and power sales transactions, the resulting transmission transaction falls within the Federal sphere of regulation.[157]

Nor is our decision not to unbundle transmission from retail generation service inconsistent with our assertion of jurisdiction over unbundled interstate transmission to retail customers. As we explained in the Final Rule and described further above, we have exclusive jurisdiction under the FPA over "transmission in interstate commerce" by public utilities, which includes the unbundled interstate transmission

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[157] *FERC Statutes and Regulations, Regulations Preambles January 1991-June 1996* at p. 31,781; *mimeo* at pp. 430-31 (emphasis in original). As discussed in section IV.I., *infra*, we believe this jurisdictional determination is supported by the statute and the case law, including the D.C. Circuit's recent decision in *United Distribution Companies v. FERC*, 88 F.3d 1105 (1996).

component of a previously bundled retail transaction.[158] Our assertion of jurisdiction in such a situation arises only if the retail transmission in interstate commerce by a public utility occurs voluntarily or as a result of a state retail program.

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3. Curtailment and Interruption Provisions[297]

a. Pro-Rata Curtailment Provisions

In the Final Rule, the Commission found that curtailment on a pro-rata basis is appropriate for curtailing transactions that substantially relieve a constraint.[298] The Commission explicitly allowed the transmission provider discretion to curtail the services, whether firm or non-firm, that substantially relieve the constraint.

The Commission also indicated that it would consider granting deference to an alternative curtailment method to avoid hydro spill if such a regional practice is generally accepted and adhered to across the region.

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158 *FERC Statutes and Regulations, Regulations Preambles January 1991-June 1996* at p. 31,781; *mimeo* at p. 431.

297 In the Final Rule pro forma tariff, the Commission defines curtailment as: "A reduction in firm or non-firm transmission service in response to a transmission capacity shortage as a result of system reliability conditions." (pro forma tariff section 1.7). The pro forma tariff defines interruption as: "A reduction in non-firm service due to economic reasons pursuant to section 14.7." (pro forma tariff section 1.15). The distinction between curtailment and interruption may have been blurred in Order No. 888 and this order attempts to clarify that distinction.

298 *FERC Statutes and Regulations, Regulations Preambles January 1991-June 1996* at p. 31,749; *mimeo* at pp. 335-36.

The Commission further found that under network and point-to-point service, the transmission provider may propose a rate treatment (penalty provision) to apply in the event a customer fails to curtail service as required under the Final Rule pro forma tariff and indicated that such proposals will be evaluated on a case-by-case basis on compliance.

Rehearing Requests

PA Com asserts that pro rata curtailment fails to hold native load harmless to the extent practical as required by the FPA. PA Com points out that on January 19, 1994, PJM initiated pro-rata load shedding, in part to preserve economic transactions, leaving customers in Pennsylvania without power during a record cold spell.

VA Com argues that pro rata curtailment may harm native load customers and section 206 complaints are after the fact and of little assistance to native load. VA Com argues that curtailment priority (in order of curtailment) should be: non-firm, contract firm, and then native load, and that utilities should have flexibility to curtail on a pro-rata basis within classes, subject to state curtailment policy.

Several entities argue that provision must be made for preference in curtailment priorities obtained through settlement, through payment of good and valuable consideration, or under existing transmission contracts.[299] Turlock argues that customers should be able to obtain a variation from the pro rata scheme if they can show that they have made either past or future investments to improve constrained facilities and that the quid pro quo for their investment is improved curtailment priority.

Allegheny asks the Commission to clarify that it did not intend to require public utilities to shed (through pro rata curtailment) native transmission load customers in order to

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299 *E.g.*, Santa Clara, Redding, TANC.

preserve some portion of service to through system users of the grid. According to Allegheny, the FPA mandates that service reliability to franchise customers must be maintained and through-system users are not similarly situated to native transmission load customers and should not be treated the same in an emergency because through system customers can protect themselves, but native transmission load customers cannot. Allegheny adds that failure to maintain system reliability would violate section 211 of the FPA.

CCEM asserts that hard and fast priority rules are needed to prevent inconsistent rules from developing for different utilities, pools, or control areas.

Commission Conclusion

Assertions that the pro-rata curtailment provision in the tariff may harm native load customers are misplaced. The Commission clarified in the Final Rule that it was not requiring a pro-rata curtailment of all transactions at the time of a constraint, but rather curtailment of

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those transactions, whether firm or non-firm, that effectively relieve the constraint.[300] The Commission also required that such curtailments be made on a non-discriminatory basis, including the transmission provider's own wholesale use of the system. The Commission further explained that the pro-rata curtailment provision was intended to apply to situations where multiple transactions could be curtailed to relieve a constraint. Of course, if curtailment of multiple transactions is necessary, non-firm service would be curtailed prior to firm service. However, the Commission established that, in emergencies, the transmission provider had the discretion to interrupt firm service under the tariff to ensure the reliability of its transmission system.

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300 *FERC Statutes and Regulations, Regulations Preambles January 1991-June 1996* at p. 31,749; *mimeo* at p. 335.

In terms of reliability, we believe that sufficient safeguards have been established to protect native load. In particular, the transmission provider is responsible for planning and maintaining sufficient transmission capacity to safely and reliably serve its native load. Order Nos. 888 and 889 permit the transmission provider to reserve, in its calculation of ATC, sufficient capacity to serve native load.

Allegations that a utility did not curtail on a non-discriminatory basis, but instead favored a certain class of customer or type of transaction should be filed in a section 206 complaint proceeding to be reviewed on a case-specific basis. While it is true that such complaints will be processed on an after-the-fact basis, it is only on a fact-specific basis that such complaints can be fully and adequately reviewed.

Additionally, tariff section 14.7 does in fact establish that for curtailment purposes, non-firm point-to-point transmission shall be subordinate to firm transmission service and non-firm service may also be interrupted for economic reasons. However, adopting curtailment schemes based solely on classes of service, as proposed by the VA Com, is inappropriate. Specifically, VA Com's proposal to curtail all non-firm transmission transactions prior to firm transactions could exacerbate an emergency situation. For example, a curtailment could be necessary due to a constraint affecting northbound transactions. However, curtailing all non-firm transactions, including southbound transactions (or counterflows), could worsen the situation. Accordingly, the Commission believes the approach established in the Final Rule of allowing non-discriminatory curtailments of the transaction(s) that effectively relieve(s) the constraint is appropriate.

In response to CCEM's concerns regarding the potential for inconsistent rules for different utilities, pools or control areas, the Commission explained in the Final Rule that any proposed deviations from the non-price terms and conditions

of the pro forma tariff, such as regional practices, must be adequately supported by the utility proposing the change.

Finally, Order No. 888 did not abrogate existing contracts;[301] therefore, customers with unique curtailment priorities established by pre-existing contracts would not have these priorities eliminated for the term of the existing contract.

b. Curtailment and Interruption Provisions for Non-firm Service

In the Final Rule, the Commission explained that it had clarified in the pro forma tariff that a network customer's economy purchases have a higher priority than non-firm point-to-point transmission service (citing AES Power, Inc.[302]).[303]

The Commission also revised the pro forma tariff to allow the transmission provider to curtail non-firm service for reliability reasons or to interrupt the service for economic reasons (i.e., in order to accommodate (1) a request for firm transmission service, (2) a request for non-firm service of greater duration, (3) a request for non-firm transmission service of equal

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duration with a higher price, or (4) transmission service for economy purchases by network customers from non-

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[301] We note that in Order No. 888 we partially modified existing economy energy coordination agreements. *FERC Statutes and Regulations, Regulations Preambles January 1991-June 1996* at p. 31,666; *mimeo* at p. 91.

[302] 69 FERC ¶61,145, at p. 62,300 (1994) (proposed order), 74 FERC ¶61,220 (1996) (final order).

[303] *FERC Statutes and Regulations, Regulations Preambles January 1991-June 1996* at p. 31,750; *mimeo* at pp. 338-39.

designated resources). The Commission further explained that a firm point-to-point customer's use of transmission service at secondary points of receipt and delivery will continue to have the lowest priority.

Rehearing Requests

For comparability, CCEM asserts that secondary receipt points should be made subordinate to other firm services,[304] but should have priority over non-firm point-to-point transactions. CCEM also argues that non-firm point-to-point service, once scheduled, should not be interrupted to accommodate non-firm service for a network service economy purchase.

VT DPS argues that firm flexible point-to-point service over secondary points of receipt and delivery should have a priority over non-firm point-to-point service (citing sections 14.2 and 14.7 of the pro forma tariff). It argues that this priority is necessary to reflect the fact that point-to-point customers pay for firm service and to be consistent with the treatment of network customers. VT DPS notes that in the natural gas industry the Commission has found that such priority is essential to reflect the fact that firm customers are paying for firm service (citing Order No. 636-B).

APPA asks the Commission to clarify the conditions under which the Commission will allow non-firm service to be interrupted by the transmission provider solely for economic reasons. APPA claims that this clarification is needed so as to prevent interruption of service on a discriminatory basis.

CCEM states that non-firm point-to-point transmission service does not provide the user with a specific capacity

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304 A firm point-to-point customer has a right to change its receipt points if capacity is available. These changed receipt points are known as secondary receipt points. The issue addressed here is the priority that is assigned to those secondary receipt points.

reservation, and therefore such service should bear no reservation or demand-like charges and the customer should pay a commodity-only charge only for when the service is being provided.[305] It contends, for example, that if a customer schedules one week of weekly non-firm transmission service and is interrupted on the second day of service, the customer should only pay for the service it used and should have no responsibility to take or to pay for service for the remainder of the week. Alternatively, it argues that if there are reservation charges and the non-firm customer pays for service on a "take-or-pay basis" regardless of use, non-firm service should not be subject to being bumped once service is scheduled and power is flowing. Moreover, if the non-firm point-to-point transmission customer does pay reservation charges on a "take-or-pay basis," the non-firm reserved capacity should be tradeable in a secondary market.

Commission Conclusion

We reject CCEM's proposal to prevent scheduled non-firm transmission service from being interrupted to accommodate economy purchases for network customers. Non-firm service is provided on an interruptible basis. To the extent CCEM wishes to obtain service that cannot be interrupted to accommodate other transactions, it has the option of requesting firm service in the form of either network or point-to-point transmission service.

APPA's concerns have already been addressed by the Commission. In the Final Rule, the Commission specifically listed the economic reasons that a transmission provider could interrupt non-firm point-to-point transmission to include:

> accommodat[ing] (1) a request for firm transmission service, (2) a request for non-firm service of greater

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305 *See also* Tallahassee.

> duration, (3) a request for non-firm transmission service of equal duration with a higher price, or (4) transmission service for economy purchases by network customers from non-designated resources.[306]

CCEM's arguments are misplaced in that they focus on the specific rate (including any potential credits for service interruption) that utilities may propose for non-firm point-to-point transmission service. Order No. 888 did not mandate any pricing methodology to be used for non-firm point-to-point transmission service.

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Rather, the Commission established the minimum non-price terms and conditions necessary to ensure comparable service. As the Commission explained in the Final Rule, utilities are free to propose any rates for non-firm point-to-point transmission in a section 205 filing consistent with the Commission's Transmission Pricing Policy Statement.[307] However, the Commission will evaluate the appropriateness of such proposed rates against the non-price terms and conditions established in the pro forma tariff or other non-price terms and conditions proposed and fully supported by the utility.[308]

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[306] *FERC Statutes and Regulations, Regulations Preambles January 1991-June 1996* at p. 31,750; *mimeo* at p. 338.

[307] *FERC Statutes and Regulations, Regulations Preambles January 1991-June 1996* at pp. 31,769-70; *mimeo* at pp. 395-99.

[308] We note that CCEM has pursued these arguments (raised on rehearing) in utility-specific rate cases and its objections will be addressed there.

The Commission has previously addressed VT DPS' point.[309] Non-firm point-to-point customers pay for non-firm service as their service. Firm point-to-point customers, on the other hand, contract and reserve a specified amount of service over designated points of receipt and delivery. The Commission permitted these firm point-to-point customers to use secondary non-firm service (from points of receipt/delivery other than those designated in their service agreement) on an as-available basis at no additional charge. Because the firm point-to-point customers taking secondary non-firm are accorded this scheduling flexibility at no additional charge, they are properly accorded a lower priority than stand alone, non-firm transmission. In contrast, network customers are responsible for paying for a percentage of total system transmission costs in order to serve their designated network loads whether the energy is from designated network resources or from non-designated resources on an as-available basis.[310] Because the network customer pays a load-ratio share of total transmission costs, it receives a higher priority. Significantly, if any firm point-to-point customer wants to avail itself of the higher priority associated with economy energy purchases under the network tariff, it is free to do so by undertaking the cost responsibilities associated with network service.

Finally, in response to VT DPS, we note that we have chosen different approaches in the electric and natural gas areas. In this regard, we recognize that there is a trade-off between encouraging tradable capacity rights versus maximizing revenues that can be credited against the

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309 *See FERC Statutes and Regulations, Regulations Preambles January 1991-June 1996* at p. 31,750; *mimeo* at p. 338, and *AES Power, Inc.*, 69 FERC ¶61,345, at p. 62,300 (1994) (proposed order), 74 FERC ¶61,220 (1996) (final order).

310 This is comparable to the service a utility provides its native load.

transmission provider's costs of providing transmission service. On the electric side, fully developed transmission capacity trading rights simply do not exist at this time, and so we have chosen to emphasize an approach that maximizes revenues to be credited to transmission customers. However, we will continue to evaluate our approach in the context of any future transmission rate proposal that is based on the concept of tradable capacity rights.

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I. Federal and State Jurisdiction: Transmission/Local Distribution

In the Final Rule, the Commission explained that after reviewing the extensive analysis of the FPA, legislative history, and case law contained in both the initial Stranded Cost NOPR and in the Open Access NOPR, and the comments received on that analysis, it reaffirmed its

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assertion of jurisdiction over the transmission component of an unbundled interstate retail wheeling transaction.[451] The Commission also reaffirmed and clarified its determinations regarding the tests to be used to determine what constitute Commission-jurisdictional transmission facilities and what constitute state-jurisdictional local distribution facilities in situations involving unbundled wholesale wheeling and unbundled retail wheeling.

The Commission also explained that where states unbundle retail sales, it will give deference to their determinations as to which facilities are transmission and

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[451] *FERC Statutes and Regulations, Regulations Preambles January 1991-June 1996* at pp. 31,780-85; *mimeo* at pp. 427-42.

which are local distribution, provided that the states, in making such determinations, apply the seven criteria discussed in the NOPR and reaffirmed by the Commission. In addition, the Commission clarified that there is an element of local distribution service in any unbundled retail transaction, and further clarified other aspects of its jurisdictional ruling to preserve state jurisdiction over matters that are of local concern and will remain subject to state jurisdiction if retail unbundling occurs.

The Commission reaffirmed its legal determination that if unbundled retail transmission in interstate commerce occurs voluntarily by a public utility or as a result of a state retail access program, this Commission has exclusive jurisdiction over the rates, terms, and conditions of such transmission. The Commission found compelling the fact that section 201 of the FPA, *on its face*, gives the Commission jurisdiction over transmission in interstate commerce (by public utilities) without qualification.

The Commission further explained that when a retail transaction is broken into two or more products that are sold separately, the jurisdictional lines change. In this situation, the Commission emphasized that the state clearly retains jurisdiction over the sale of the power, but the unbundled transmission service involves *only* the provision of "transmission in interstate commerce" which, under the FPA, is exclusively within the jurisdiction of the Commission.

The Commission recognized that in asserting jurisdiction over unbundled retail transmission in interstate commerce by public utilities, it was in no way asserting jurisdiction to order retail transmission directly to an ultimate consumer. It explained that its assertion of jurisdiction is that *if* unbundled retail transmission in interstate commerce by a public utility occurs voluntarily or as a result of a state retail wheeling program, the Commission has exclusive jurisdiction over the rates, terms, and conditions of such transmission and public

utilities offering such transmission must comply with the FPA by filing proposed rate schedules under section 205.

The Commission further clarified that nothing in its jurisdictional determination changes historical state franchise areas or interferes with state laws governing retail marketing areas of electric utilities. It explained that while its jurisdiction cannot affect whether and to whom a retail electric service territory (marketing area) is to be granted by the state, and whether such grant is exclusive or non-exclusive, neither can state jurisdiction affect this Commission's exclusive jurisdiction over transmission in interstate commerce by public utilities.

The Commission also adopted a new section 35.27(b) as follows:

> Nothing in this part (i) shall be construed as preempting or affecting any jurisdiction a state commission or other state authority may have under applicable state and federal law, or (ii) limits the authority of a state commission in accordance with state and federal law to establish (a) competitive procedures for the acquisition of electric energy, including demand-side management, purchased at wholesale, or (b) non-discriminatory fees for the distribution of such electric energy to retail consumers for purposes established in accordance with state law.

With respect to the Commission's adoption of the Open Access NOPR's functional/technical tests for determining what facilities are Commission-jurisdictional facilities used for transmission in interstate commerce and what facilities

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are state-jurisdictional local distribution facilities, the Commission concluded that it could not divine a bright line for unbundled retail transmission by the public utility that

previously provided bundled retail service to the end user. The Commission added that the limited case law, including *Connecticut Light & Power Company v. FPC* (*CL&P*) and *Federal Power Commission v. Southern California Edison Company* (the *Colton* case),[452] supports a case-by-case determination.[453] Accordingly, the Commission stated that its technical test, with its seven indicators, will permit reasoned factual determinations in individual cases.

The Commission made two clarifications regarding local distribution in the context of retail wheeling. First, it explained that even if its technical test for local distribution facilities were to identify no local distribution facilities for a specific transaction, states have authority over the *service* of delivering electric energy to end users. Second, the Commission explained that through their jurisdiction over retail delivery services, states have authority not only to assess retail stranded costs but also to assess charges for so-called stranded benefits, such as low-income assistance and demand-side management.

Thus, under this interpretation of state/federal jurisdiction, the Commission explained, customers have no incentive to structure a purchase so as to avoid using identifiable local distribution facilities in order to bypass state jurisdiction and thus avoid being assessed charges for stranded costs and benefits.

The Commission further determined that it is appropriate to provide deference to state commission recommendations regarding certain transmission/local distribution matters that arise when retail wheeling occurs.

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[452] 324 U.S. 515 (1945) (*CL&P*); 376 U.S. 205 (1964) (*Colton*).

[453] The Commission included a detailed legal analysis in appendix G to Order No. 888. The Commission explained that it was particularly persuaded by the Supreme Court's statement that whether facilities are used in local distribution is a question of fact to be decided by the Commission as an original matter. *See CL&P*, 324 U.S. at 534-35).

In instances of unbundled retail wheeling that occurs as a result of a state retail access program, the Commission indicated that it will defer to recommendations by state regulatory authorities concerning where to draw the jurisdictional line under the Commission's technical test for local distribution facilities, and how to allocate costs for such facilities to be included in rates, provided that such recommendations are consistent with the essential elements of the Final Rule.[454] Moreover, the Commission indicated that it will consider jurisdictional recommendations by states that take into account other technical factors that the state believes are appropriate in light of historical uses of particular facilities.

As a means of facilitating jurisdictional line-drawing, the Commission stated that it will entertain proposals by public utilities, filed under section 205 of the FPA, containing classifications and/or cost allocations for transmission and local distribution facilities. However, the Commission explained that, as a prerequisite to filing transmission/local distribution facility classifications and/or cost allocations with the Commission, utilities must consult with their state regulatory authorities. If the utility's classifications and/or cost allocations are supported by the state regulatory authorities and are consistent with the principles established in the Final Rule, the Commission indicated that it will defer to such classifications and/or cost allocations.

Furthermore, the Commission stated that deference to state commissions with regard to rates, terms, and conditions may be appropriate in some circumstances. The Commission explained that when unbundled retail wheeling in interstate commerce occurs, the transaction has two components for

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[454] In order to give such deference, the Commission noted its expectation that state regulators will specifically evaluate the seven indicators and any other relevant facts and make recommendations consistent with the essential elements of the Rule.

jurisdictional purposes—a transmission component and a local distribution component. It again emphasized that the Commission has jurisdiction over facilities used for the transmission component of the transaction, and the state has jurisdiction over facilities used for the local distribution component. Thus, the Commission stated,

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the rates, terms and conditions of unbundled retail transmission by a public utility must be filed at the Commission. However, the Commission added, if the unbundled retail wheeling occurs as part of a state retail access program, it may be appropriate to have a separate retail transmission tariff[455] to accommodate the design and special needs of such programs. In such situations, the Commission indicated that it will defer to state requests for variations from the FERC wholesale tariff to meet these local concerns, so long as the separate retail tariff is consistent with the Commission's open-access policies and comparability principles reflected in the tariff prescribed by the Final Rule. In addition, the Commission indicated that the rates must be consistent with its Transmission Pricing Policy Statement, and the guidance set forth in Order No. 888 concerning ancillary services.[456]

The Commission also expressed concern, just as it did with buy-sell arrangements in the gas industry, that buy-sell arrangements can be used by parties to obfuscate the true transactions taking place and thereby allow parties to circumvent Commission regulation of transmission in interstate commerce. Thus, the Commission reaffirmed its

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[455] The Commission noted that such a tariff could be different from the tariff that applies to wholesale customers, but that such tariff would still be filed with the Commission under FPA section 205.

[456] In applying the principles of the Final Rule to retail transmission tariffs, the Commission emphasized that it clearly cannot order retail wheeling directly to an ultimate consumer. (citing FPA section 212(h)).

conclusion that it has jurisdiction over the interstate transmission component of transactions in which an end user arranges for the purchase of generation from a third-party. Moreover, the Commission indicated that it will address these transactions on a case-by-case basis.

Rehearing Requests

Oppose Commission Assertion of Jurisdiction Over Unbundled Retail Transmission

Several state commissions indicate that, recognizing that the case law is not dispositive concerning the question of unbundled retail transmission services (either because the cases do not involve the transmission of power to retail customers or "fence off" local distribution from federal regulation), at least one court (*Wisconsin-Michigan Power Company v. FPC*, 197 F.2d 472 (7th Cir. 1952), *cert. denied*, 345 U.S. 934 (1953)) explicitly applied the wholesale/retail distinction to distinguish transmission and local distribution services.[457] Thus, they argue, the Commission should apply the wholesale versus retail analysis to the question of unbundled retail transmission.

IL Com asserts that retail transmission by a public utility directly to an end user has always (even before the FPA was enacted) been subject to regulation by the states. It contends that no change in law has occurred which justifies the Commission's claim of expanded jurisdiction. Moreover, it disagrees with the Commission's conclusion that the unbundled delivery by the previous public utility generation supplier directly to an end user is in interstate commerce. It argues that the FPA was never intended to disturb the jurisdiction of state regulators that existed prior to its passage and that retail transmission of electric energy by a public utility to an end user was under state jurisdiction before the *Attleboro* decision and has remained under state jurisdiction

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457 *E.g.*, NARUC, WI Com, WY Com.

in the over sixty years following *Attleboro*. Even after unbundling, according to IL Com, transmission to a retail customer still involves a retail sale of transmission.

NARUC and VA Com assert that the legislative history provides little support for the Commission's conclusion that the act of unbundling generation from delivery serves to shift jurisdiction from a state commission to the Commission. If anything, they contend, the jurisdictional structure of the FPA is predicated on the distinction between retail and wholesale transactions, not bundled and unbundled services. They assert that the Commission should conclude that the rates, terms and conditions of service for delivery of power by a utility to an end-use customer are subject to the jurisdiction of the state commission regulating the utility, regardless of the identity of the party generating

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or reselling the power or the facilities used to transport the power.

NARUC asserts that the Commission did not address a point raised in NARUC's reply comments as to how the removal of generation serves to unbundle the retail delivery function into separate transmission and distribution services. It maintains that the Commission simply assumes that a resulting transmission transaction is created when power is sold to a retail consumer by someone other than the utility delivering the power.[458]

MI & NH Coms ask the Commission to vacate those portions of the Rule that find that the Commission has jurisdiction over the transmission component of an

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458 *See also* IA Com (use of a utility's transmission system to serve its own retail customers is a bundled part of the retail sale transaction, which supports a simpler jurisdictional test holding that a movement of power by the last utility in any chain of delivery to a retail customer is a distribution transaction).

unbundled retail sale in a local retail wheeling transaction. They assert that the Commission should confine its activity to wholesale transactions or those interstate transactions that do not implicate matters of local concern. They argue that the dual federal/state regulatory scheme establishes that Congress' intent is that state regulation of retail wheeling is *not* preempted by federal law as established in FPA section 201. They oppose unnecessary federal intrusion into local matters under a one-size-fits-all approach and assert that the retail wheeling initiatives in New Hampshire and Michigan are tailored to the unique utility environment in each state.

Central Illinois Light argues that unbundling of retail electric service does not change the states' longstanding jurisdiction over retail electric service and local distribution, even when that service involves the use of transmission in interstate commerce. It asserts that 201(b)(1) ("transmission of electric energy in interstate commerce") cannot be read in a vacuum.

MN DPS & MN Com and OH Com assert that the Commission should have no role in the regulation of retail services, be they bundled or unbundled. They argue that, in refusing to grant the Commission authority over retail wheeling, Congress left jurisdiction over retail electric service to the states. They conclude that the Final Rule contains insufficient legal and/or policy justification for the Commission's assertion of jurisdiction over unbundled retail transmission services.

MN DPS & MN Com assert: "FERC bases its usurpation of state authority over retail transmission rates on its claim that balkanization would occur without the assertion of FERC authority. Therefore, the parties are entitled to rehearing so that this essential issue can be further analyzed." (MN DPS & MN Com at pp. 1-3).

FL Com argues that the Commission has not justified why the act of unbundling prices expands the Commission's

jurisdiction into retail marketing areas. It argues that Section 212(g) of the FPA has the effect of prohibiting the Commission from usurping existing state jurisdiction over retail transmission service, whether bundled or unbundled. According to FL Com, FERC's jurisdiction over transmission terminates at the territorial boundary of each electric utility in Florida. It supports wheeling in jurisdiction for state commissions and wheeling out and wheeling through jurisdiction for the Commission.

IN Com opposes federalization of retail wheeling transactions within a state's boundaries as contrary to the FPA's legislative history and case law.

NJ BPU asserts that by claiming jurisdiction over unbundled retail transmission, the Commission is creating a disincentive for states to implement retail access because, by ordering retail access, the states may be relinquishing their jurisdiction over unbundled retail transmission terms and conditions—jurisdiction that they would maintain under a bundled scenario.[459] PA Com argues that the Commission does not have the authority to order retail wheeling and that the jurisdictional formula is challengeable on engineering and legal grounds. It concludes that the Commission does not have jurisdiction over unbundled interstate retail transmission service. PA Com notes that the 1996 House and Senate hearings have

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raised the question whether the Commission has the statutory authority to restructure the electric industry. PA Com questions the Commission's definition of the "traditional tasks of state and federal regulators" on the basis of section 201(b) of the FPA, the Supremacy Clause, and the Tenth Amendment of the U.S. Constitution.

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[459] *See also* PA Com.

Support Broader Assertion of Jurisdiction by the Commission Over Retail Wheeling

NY Utilities declare that the Commission has jurisdiction over retail wheeling from the source to the load, but does not have jurisdiction over transmission in bundled retail service. They assert that the Commission's reliance on state jurisdictional local distribution as a predicate to abstain from allowing retail wheeling stranded cost recovery is without foundation. They further assert that a unique element that sets local distribution apart from transmission is not the size of the facility or the length of travel, but that transportation is bundled with a retail sale. According to NY Utilities, the plain meaning of the FPA shows that local distribution is bundled retail service. They claim that the legislative history, to the extent necessary, and court cases support FERC jurisdiction over all aspects of retail wheeling, but makes clear that the Commission cannot regulate bundled retail service. They add that the NGA also demonstrates that local distribution means bundled retail service.

Commission Conclusion

In concluding that this Commission has exclusive jurisdiction over the rates, terms and conditions of unbundled retail transmission by public utilities in interstate commerce, the Commission in Order No. 888 thoroughly examined the statutory language of the FPA and its legislative history, and relevant FPA and NGA case law. While the state commissions on rehearing would like us to draw a bright line that gives them, to varying degrees, jurisdiction over retail interstate transmission by public utilities, no party on rehearing has raised any legislative history or case law that was not previously considered and that would support the proposition that states have jurisdiction over any unbundled transmission in interstate commerce. As explained below, we reaffirm our jurisdictional interpretation on rehearing and

believe that it is supported by the recent decision in *United Distribution Companies v. FERC.* [460]

Many of the rehearing arguments focus on the fact that states historically (even prior to the FPA) regulated retail transmission insofar as it was a component of bundled electric service to an end user, and they argue that by asserting jurisdiction over unbundled retail transmission, the Commission is somehow "taking away" jurisdiction the states previously had. The flaw in these arguments is their inherent assumption that jurisdiction over transmission service turns upon the question of whether the transmission service is being provided for "wholesale" or "retail" power sales. That is not the case. The question of jurisdiction rather turns upon the extent of the Commission's exclusive jurisdiction over transmission in interstate commerce under the FPA. The fact that states historically regulated most retail transmission service as a part of a bundled retail power sale is not the result of a legal requirement; it is the practical result of the way electricity has historically been bought and sold. However, the shape of power sales transactions is rapidly changing. Rather than claiming "new" jurisdiction, the Commission is applying the same statutory framework to a business environment in which, as discussed below, retail sales and transmission service are provided in separate transactions.

In the past, retails ales occurred almost exclusively on a bundled basis (i.e., the same entity provided a delivered product called electric energy and transmission was part and parcel of that product). The FPA clearly reserves the right to regulate retail sales of electric energy to the states. As we explained in the Final Rule, however, in today's markets, and increasingly in the future as more states adopt retail wheeling programs, retail transactions are being broken into products that are being sold separately: transmission and generation.

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460 88 F.3d 1105, 1152-53 (1996) (*United Distribution Companies*).

Moreover, these products are being sold increasingly by two or more different entities. For example, a transaction may

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involve transmission service from one or more transmission providers who move power from a distant generation supplier, over the interstate transmission grid, to an end user. Because these types of products and transactions were not prevalent in the past, the jurisdictional issue before us did not arise and, contrary to IL Com's argument, the Commission cannot be viewed as "disturbing" the jurisdiction of state regulators prior to and after the *Attleboro* case.[461]

As we also explained in the Final Rule, the legislative history of the FPA and the relevant case law similarly reflect the historical market structure in which electricity and transmission generally were bought on a bundled basis.[462] Today's unbundled world simply was not contemplated and the cases do not resolve dispositively this jurisdictional issue. The case law focuses primarily on the bright line between wholesale sales and retail sales of *energy*, and transmission in interstate as opposed to intrastate commerce. It does not address unbundled retail interstate transmission.[463] We

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461 *Public Utilities Commission v. Attleboro Steam & Electric Co.*, 273 U.S. 83 (1927).

462 The case law is addressed extensively in appendix G to the Final Rule and will not be repeated here.

463 On rehearing, several parties argue that at least one court case, *Wisconsin-Michigan Power Co. v. FPC*, 197 F.2d 472 (7th Cir. 1952), *cert. denied*, 345 U.S. 934 (1953) explicitly applied the wholesale/retail distinction to distinguish transmission and local distribution services. The Commission discussed this case in detail in appendix G to the Final Rule, *FERC Statutes and Regulations, Regulations Preambles January 1991-June 1996* at pp. 31,974-75; *mimeo* at pp. 22-25. As we stated there, the court's interpretation of the legislative history of the FPA was at odds with both the plain words of the statute as well as the language of the House Report on the FPA (H.R. Rep. No. 1318 at p. 27). It also did not mention the Senate Report on the FPA, which clearly recognized

therefore have interpreted the case law in light of changed circumstances and have relied in the first instance on the plain wording of the statute. We find compelling that section 201 of the FPA, on its face, gives the Commission jurisdiction over transmission in interstate commerce without qualification; unlike our jurisdiction over sales of electric energy, which section 201 specifically limits to sales at wholesale, the statute does not limit our transmission jurisdiction over public utilities to wholesale transmission.

Since the time Order No. 888 issued, the D.C. Circuit has addressed a similar issue in interpreting section 1(b) of the NGA, the provision that parallels section 201(b) of the FPA. Under section 1(b), the Commission's jurisdiction does not apply "to the local distribution of natural gas or to the facilities used for such distribution." Similarly, under section 201(b) of the FPA, the Commission shall not have jurisdiction, except as specifically provided, "over facilities used for the generation of electric energy or over facilities used in local distribution. . . ." In responding to arguments regarding the scope of state authority over "local distribution" of natural gas, the court distinguished between bundled and unbundled sales:

> States have been—and are still—permitted to regulate LDCs' bundled sales of natural gas to end-users because those transactions include transportation over local mains and the retail sales of gas. In contrast, states have *never* regulated the terms and conditions of interstate pipeline transportation. When the gas sales element is severed—i.e., unbundled—from the transactions, FERC retains jurisdiction over the *interstate*

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jurisdiction over all interstate transmission lines, whether or not a sale of energy is carried by those lines (S. Rep. No. 621 at p. 48). We therefore reject arguments that this single case is in any way dispositive of the issue before us.

> *transportation* component." [*United Distribution Companies*, 88 F.3d at 1153 (footnote omitted) (emphasis in original).]

The court's reasoning is also applicable to and supports our jurisdictional determination in Order No. 888.

Several state commissions point to section 212(h) of the FPA and argue that Congress, in refusing to grant the Commission authority to order retail wheeling, left all jurisdiction over retail transmission to the states. We disagree. What Congress did in section 212(h) was to prohibit us from *ordering* transmission directly to an ultimate consumer. We readily recognize and respect this prohibition. However, the ability to order retail

[30,341]

wheeling is a separate issue from whether we have jurisdiction over the rates, terms and conditions of retail wheeling in interstate commerce that is ordered by a state or that is provided voluntarily. Congress, in enacting section 212(h), did nothing to modify our jurisdiction under sections 201, 205 and 206 over the rates, terms and conditions of interstate transmission by public utilities.

Similarly, we reject FL Com's arguments that section 212(g) of the FPA prohibits the Commission from asserting any jurisdiction over unbundled retail transmission. Section 212(g) prohibits the Commission from issuing an order that is inconsistent with any state law that governs retail marketing areas of electric utilities. As we stated in the Final Rule, while our jurisdiction cannot affect whether and to whom a retail electric service territory (marketing area) is to be granted by the state, and whether such grant is exclusive or non-exclusive, neither can state jurisdiction affect this Commission's exclusive jurisdiction over the rates, terms and conditions of transmission in interstate commerce by public utilities. We also reject arguments by the FL Com that this Commission's jurisdiction over transmission terminates at

the territorial boundary of each electric utility in Florida. This argument is flatly contrary to the longstanding interpretation of the FPA by the United States Supreme Court.[464464]

Commission's Seven Factor Test

IL Com argues that the Commission should withdraw its technical test. It contends that retail wheeling jurisdiction should follow function and that the function served by public utility facilities in providing retail service does not change upon the unbundling of service to retail customers. According to IL Com, Commission jurisdiction would extend to the service of delivering electric energy by a public utility to wholesale customers, regardless of the nature and extent of the public utility's facilities used to make that delivery. Similarly, it asserts, state jurisdiction would extend to the service of delivering electric energy by a public utility directly to retail customers, regardless of the nature and extent of the public utility's facilities used to make that delivery.

NARUC argues that the seven-factor test does not result in the bright line discussed in *FPC v. Southern California Edison Company*, 376 U.S. 205 (1964). The facility-by-facility categorization of utility systems on a company-specific basis, it asserts, is hardly consistent with the Court's decision to make case-by-case analysis unnecessary.

OH Com asserts that the seven factors provide no useful insight into the nature of local distribution service. It adds that reliance upon technical tests to determine local distribution lacks legal foundation. It further contends that the jurisdictional bright line established by Congress focuses upon the nature of the transaction, not the functional or

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464 *See FPC v. Southern California Edison Co.*, 376 U.S. 205 (1964) (*Colton* case). IN Com makes a similar argument and opposes "federalization" of retail wheeling within a state's boundaries. We reject this argument on the same basis.

technical characteristics of a particular wire, in determining whose jurisdictional authority attaches to a particular transaction and facilities. It concludes that the Commission should adopt the Ohio-proposed retail marketing area "wheeling in" jurisdictional approach.

PA Com contends that the Commission's seven indicia are not acceptable measures of local distribution and challenges each factor.

NH & MI Coms declare that the criteria for distinguishing transmission facilities from local distribution facilities should not be limited to the seven given in the Rule, but should allow consideration of any other relevant criteria for separating local concerns from matters legitimately federal in nature.

NJ BPU argues that the engineering-driven definition does not resolve many of the hazy areas. To the extent that the seven factors do not reflect or cannot be reconciled with the particular circumstances, it contends that the states may be hamstrung in their ability to make

[30,342]

reasoned decisions that comport with Order No. 888.[465]

Similarly, NY Com argues that five of the seven factors (1, 2, 4, 6,and 7) are not accurate when applied to large metropolitan areas and remote rural areas. It asserts that local distribution facilities are not necessarily close to retail customers and the assumption that local distribution facilities are primarily radial in character fails to account for network systems. It adds that reconsignment or transportation of power to different markets can and does occur at the local

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[465] *See also* WI Com (criteria do not appropriately reflect the mixed nature of many facilities in systems that are closely integrated and the application of the criteria to the electric system in Wisconsin would supplant state jurisdiction over a large number of facilities whose primary functions are local reliability and retail service).

distribution level. It further adds that the presence of meters is not a discerning characteristic of where interstate transmission ends and local distribution begins; meters are frequently not part of the transmission/local distribution interface. Nor, according to NY Com, are local distribution systems necessarily of reduced voltage. Instead of the 7 criteria, NY Com argues that the Commission should adopt a functional measure of local distribution based on factors 3 and 5 (interstate transmission ends and local distribution begins where electricity flows into a comparatively restricted geographic area and does not flow back out of that area and the power is consumed in that area) and on the traditional classification of the facilities by the state regulatory body (or what the utility has traditionally classified as local distribution).

Commission Conclusion

Several parties on rehearing do not like the seven-factor technical test for local distribution facilities that was set forth in Order No. 888. That test takes into account both technical and functional characteristics of the transaction involved. The parties on rehearing propose instead a variety of bright line tests. For example, IL Com wants state jurisdiction to extend to the "service" of delivering electric energy to retail customers, which it would define to give it jurisdiction regardless of the nature and extent of the facilities used to make the delivery. OH Com proposes that the Commission adopt a retail marketing area "wheeling in" jurisdictional approach which would give it jurisdiction over facilities within territorial boundaries.

In response, we do not interpret the FPA to permit us in effect to rewrite the statute to give states jurisdiction over interstate transmission services. Moreover, we reject arguments of OH Com that our seven-factor test lacks legal foundation, and arguments of NARUC that we are somehow bound to develop a bright line test. While Congress established a jurisdictional bright line between wholesale and

retail sales of energy, there is no such bright line that we can divine with regard to transmission and local distribution facilities. The Supreme Court, in both *Colton* and *CL&P*,[466] has instructed us that whether facilities are used in local distribution is a question of fact to be decided by the Commission as an original matter. The seven factors will permit us to undertake this fact-specific determination.

We acknowledge the concerns raised by several state commissions that the seven-factor test does not, as NJ BPU puts it, resolve many of the hazy areas, and that there may be other factors that should be taken into account in particular situations. The seven-factor test is intended to provide sufficient flexibility to take into account unique local characteristics and historical usage of facilities used to serve retail customers. We specifically stated in the Final Rule that we will consider jurisdictional recommendations by states that take into account other technical factors that states believe are appropriate in light of historical uses of particular facilities. Moreover, we will defer to facility classifications and/or cost allocations that are supported by state regulatory authorities. For example, in the ongoing California electric utility restructuring proceeding, the Commission deferred to the State PUC's recommendations regarding the split between state jurisdictional local distribution facilities and Commission-jurisdictional

[30,343]

transmission facilities.[467]

Oppose transmission of public utility purchases for sale at retail

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[466] *See Colton*, 376 U.S. at 210 n.6; *CL&P*, 324 U.S. at 531-36.

[467] *Pacific Gas and Electric Company, et al.*, 77 FERC ¶61,325, at p. 61,325 (1996).

IL Com objects to the transmission unbundling requirement if it is intended to require public utilities to take transmission services under their own FERC tariffs for purchases of power intended for distribution by the public utility to retail customers. According to IL Com, a distinction must be made between the public utility's use of its transmission system in cases in which the public utility purchases wholesale power for sale for resale, and cases in which the public utility purchases wholesale power to serve native load retail customers. It argues that the Commission cannot legally regulate, or place conditions on, the manner in which a utility uses its transmission system to make sales of electric energy at retail. It contends that the Commission must exempt public utility power purchases for sale at retail from the unbundling requirement. It recommends that the Commission insert the words "for sale for resale" after the word "purchases" in section 35.28(c)(2) and after the word "purchase" in section 35.28(c)(2)(i).

Commission Conclusion

The Commission rejects arguments of IL Com that if unbundled retail wheeling occurs either voluntarily or as a result of a state retail program, we cannot require the utility to take service under its own transmission tariff for sales to retail customers. This requirement is a term and condition of unbundled retail interstate transmission service and, as explained above, therefore is within our exclusive jurisdiction. Additionally, this should not in any way infringe on state retail programs or service to retail customers. Rather, it ensures that non-discriminatory transmission services are provided to all potential retail power competitors.

Further, as stated previously in section IV.C.1.b (Transmission Providers Taking Service Under Their Tariff), we clarify that a transmission provider does not have to "take service" under its own tariff for the transmission of power that is purchased on behalf of bundled retail customers.

Oppose buy-sell transaction analysis

PA Com asserts that there is a potential for jurisdictional conflict with respect to buy-sell transactions that is a direct consequence of the technical-functional test (which PA Com challenges).

IL Com argues that states have exclusive authority to regulate buy-sell arrangements as bundled retail sales. It further argues that the Commission cannot make a bundled retail sale into an unbundled retail sale simply by characterizing it as the functional equivalent of an unbundled retail sale; by re-characterizing them the Commission is effectively ordering the unbundling of buy-sell arrangements. It asserts that buy-sell arrangements on the electric side are not an end run around clear federal jurisdiction and that the Commission should withdraw its assertion of jurisdiction over the retail transmission component of unbundled retail sales.

VT DPS contends that the Commission's rationale is flawed: "FERC's analysis rests on the same very shaky ground as its similar claim of jurisdiction over buy-sell arrangements by local gas distribution companies." According to VT DPS, all retail transactions are subject to state jurisdiction and asks the Commission to clarify that the Commission defines buy-sell as it did in the NOPR, but also acknowledge that it has no jurisdiction over such arrangements.

IN Com asserts that in the absence of any record of abusive and undermining actions by states under the guise of buy-sell arrangements, there is not even a remedial justification to touch buy-sell transactions. It contends that a difference between the FPA and the NGA warrants different treatment—the FPA exempts from FERC jurisdiction local distribution and transmission of electric energy in intrastate commerce. By redefining interstate transmission, IN Com claims that the Commission proposes to do away with the

meaning history has accorded to a variety of transactions previously considered wholly intrastate in nature. According to IN Com, states should be allowed

[30,344]

to experiment with and allow different forms of buy-sell transactions as part of the evolving marketplace.

Commission Conclusion

Four parties (PA Com, IL Com, VT DPS and IN Com) have raised concerns regarding the Commission's determination that it has jurisdiction over the interstate transmission component of transactions in which an end user arranges for the purchase of generation from a third party. The Commission reiterates that we will have to address these situations on a case-by-case basis. We disagree with IL Com that States have exclusive authority to regulate the interstate transmission component of buy-sell transactions. Similarly, we deny the VT DPS request that we acknowledge no jurisdiction over such arrangements. The fact remains that these arrangements *could* be used by parties to obfuscate the true transactions taking place and thereby allow parties to circumvent Commission regulation of transmission in interstate commerce. We reserve our authorities to ensure that public utilities and their customers are not able to circumvent non-discriminatory transmission in interstate commerce. In response to VT DPS' contention that the Commission's analysis here rests on the same shaky ground as its similar claim of jurisdiction over buy-sell arrangements by local gas distribution companies, we note that the D.C. Circuit recently affirmed the Commission's assertion of jurisdiction over buy/sell arrangements under the Natural Gas Act.[468]

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468 *United Distribution Companies*, 88 F.3d at 1154-57.

State jurisdiction over the service of delivering electric energy to end users

Rehearing Requests

IL Com states that it is far from clear what FERC contemplates by the "service" of delivery of electric energy by a delivering utility in the retail wheeling transaction. It is equally unclear to IL Com whether the "service" to which Order No. 888 refers is a public utility activity over which state regulators would have jurisdiction. IL Com argues that it is the Illinois legislature, not FERC, that determines whether IL Com can regulate something called "delivery service."[469]

MO/KS Coms ask the Commission to clarify the meaning of the statement that even when the test for local distribution facilities identifies no local distribution facilities, the Commission believes that states have authority over the service of delivering electric energy to end users. According to MO/KS Coms:

> The authority to shop at retail and to sell at retail do not exist in the FPA. If the Commission's goal is to recognize the States' authority to establish conditions on retail competition, it need only acknowledge the State jurisdiction to establish the opportunity to shop and sell at retail. If this is what the Commission is seeking to accomplish by its discussion of 'delivery service,' then we support the Commission." [470]

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469 *See also* AK Com (should not create a fictional concept of delivery service—the legal reality is that, under retail competition, state law will establish a customer's right to be served and a generation owner's right to produce power. AK Com asserts that the state can then attach conditions to those rights).

[470] MO/KS Coms at pp. 1-13.

Coalition for Economic Competition asserts that the Commission failed to consider that the sale of electric energy may take place outside of the state into which the energy is transmitted, and that the local regulatory commission may have no jurisdiction over either the sale or the transmission of the energy.

Commission Conclusion

Several parties ask us to clarify our conclusion that even when the seven-factor test for local distribution facilities does not identify local distribution facilities, we believe states have authority over the "service" of delivering electric energy to end users. We clarify that states have the authority to determine the retail marketing areas of electric utilities within their jurisdictions, and the end user services that those utilities must provide, but we did not in Order No. 888 intend to opine on the extent of authority given by state legislatures to their state commissions. Rather, our statement regarding state authority over the "service" of delivering electric energy is intended to recognize the historical and local nature of delivering power to end users and the

[30,345]

states' legitimate concerns and responsibilities in regulating local matters.

Deference to states

Rehearing Requests

Support broader deference

NARUC and IL Com argue that the Commission should not simply defer to state recommendations concerning the application of the seven-factor test or the recovery of stranded costs, but should conclusively rely on the findings by state commissions.

NY Com argues that the Commission should not limit deference to instances in which states order retail wheeling,

but should defer to all state commission recommendations regarding the definition of local distribution facilities.

FL Com asserts that the Rule fails to say where deference will be given. It argues that the Rule should state that when a state commission has held a proceeding on matters related to the requirements of the Rule, the Commission shall give deference to the state commission decisions. Moreover, it asserts that the Commission should codify the deference standard: "When a state commission has held a proceeding on matters related to the requirements of this rule, the Commission shall give deference to the state commission decisions." (FL Com at pp. 7-9).

The commitment to defer to a state regulatory commission or agency, argues NE Public Power District, should be clarified with respect to utilities located in Nebraska, which has no such commission or agency. NE Public Power District assumes that deference will be accorded to decisions of NE Public Power District's Board of Directors; if not, it asks the Commission to clarify.

PA Com asks the Commission to clarify what a state regulatory agency must demonstrate to secure deference and to define the term "consult." PA Com states that, in discussing the seven indicia, the Commission states that it will "consider" jurisdictional recommendations by states, which PA Com asserts is much different from deference. It also asserts that the Commission must clarify what it will do if a utility's classifications and/or cost allocations are not supported by state regulatory authorities.

Oppose deference to state authorities

TANC argues that the Commission erred in deferring to state regulatory authorities in drawing jurisdictional lines for local distribution facility classifications and/or cost allocations. According to TANC, the Commission unlawfully and unnecessarily abdicated its jurisdiction under the FPA (citing *New England Power Co. v. New Hampshire*, 455 U.S.

331, and *Nantahala Power and Light Co. v. Thornburg*, 476 U.S. 953). With respect to ISOs, it asserts that the Commission should not defer to state authority in making determinations with respect to classifications of facilities.

Commission Conclusion

In response to NARUC and IL Com's arguments that this Commission should not simply defer to state commissions regarding application of the seven-factor test but instead should conclusively rely on the findings of state commissions, we believe this is inconsistent with the case law which states that local distribution it is a matter of fact for the Commission to determine as an original matter.[471] Additionally, we have an independent obligation to ensure that we are fulfilling our responsibilities under the FPA to regulate facilities that are used in interstate commerce. We cannot delegate our jurisdiction. However, we intend to provide broad deference to states in determining what facilities are Commission-jurisdictional transmission facilities and what facilities are state-jurisdictional local distribution facilities, so long as our comparability principles are not compromised and we are able to fulfill our responsibilities under the statute.

We reject FL Com's suggestion that we codify the deference standard. This is neither necessary nor appropriate. In response to NE Public Power District's request that we clarify to whom we would give deference in Nebraska, we clarify that because Nebraska does not have an electric regulatory commission or agency, there is no appropriate regulatory entity to whom our deference standard would apply; accordingly, we will address the

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471 *See Colton* and *Connecticut Light and Power, supra.*

transmission/local distribution issue for Nebraska without giving deference to any particular entity. In response to PA Com's request that we clarify what we will do if a utility's classifications and/or cost allocation proposals are not supported by state regulatory authorities, we will make a determination based on the factual record before us in a particular case, taking into account the views of the state regulatory authority.

TANC has argued that we have unlawfully abdicated our jurisdiction by deferring to state recommendations. TANC confuses delegation of jurisdiction, which we cannot do, with willingness to defer to states based on their application of criteria that we have provided. Even in the cases in which the Commission defers to states' views, we will still independently evaluate all material issues and proceed only where substantial evidence supports the states' views. The Commission clearly can entertain requests for deference in these circumstances.

J. Stranded Costs

As indicated in our prior discussion in Section IV.A.5, there are two major overlapping transition issues that arise as a result of this rulemaking: stranded cost recovery and how to deal with contracts entered into under the prior regulatory regime. We here address stranded cost recovery and, as in the prior discussion, we believe it is important to explain the general context in which our stranded cost determinations have been made before addressing the various rehearing requests on this issue.

In Order No. 888, the Commission removed the single largest barrier to the development of competitive wholesale power markets by requiring non-discriminatory open-access transmission as a remedy for undue discrimination. This action carries with it the regulatory public interest responsibility to address the difficult transition issues that arise in moving from a monopoly, cost-based electric utility

industry to an industry that is driven by competition among wholesale power suppliers and increasing reliance on market-based generation rates. The most critical transition issue that arises as a result of the Commission's actions in this rulemaking is how to deal with the uneconomic sunk costs that utilities prudently incurred under an industry regime that rested on a regulatory framework and a set of expectations that are being fundamentally altered.

The Commission determined in Order No. 888 that it must address stranded costs, and that it must do so at an early stage—particularly in light of the lessons learned from our experience with similar issues in the natural gas area. We noted that when we did a similar restructuring in the gas industry, the D.C. Circuit invalidated the Commission's efforts precisely because the Commission had failed to deal with the stranded cost problem in a satisfactory manner.[472] We explained that, based on the lesson of *AGD*, the Commission cannot change the rules of the game without providing a mechanism for recovery of the costs caused by such regulatory-mandated change.

Since the time Order No. 888 issued, we have been provided with additional guidance from the court in the natural gas area, which has further helped to inform our decisions here. In its decision on review of Order No. 636,[473] the D.C. Circuit upheld the Commission's decision to allow the recovery of gas supply realignment costs. In so doing, the court, while questioning a specific feature of the stranded cost recovery mechanism employed in Order No. 636, has nevertheless again reaffirmed the basic principle that stranded cost recovery is an appropriate component of a regulatory policy aimed at accomplishing a fair and

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[472] *Associated Gas Distributors v. FERC*, 824 F.2d 981 (D.C. Cir. 1987), *cert. denied*, 485 U.S. 1006 (1988) (*AGD*).

[473] *United Distribution Companies v. FERC*, 88 F.3d 1105 (1996) (*United Distribution Companies*).

reasonable transition to competitive markets. The question as to the Commission's ability to allow the recovery of stranded costs has been laid to rest.

The task before the Commission in this rulemaking is thus to determine how best to meet its responsibility to address the costs of the transition to a competitive industry, particularly insofar as those costs are stranded, or in effect rendered unrecoverable, as a result of the transmission access required by us under the

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FPA.[474] As the rehearing arguments demonstrate, there is no consensus on how the Commission should address the stranded cost issue. In fact, petitioners are at polar extremes as to what the Commission should do regarding stranded costs. Some argue that the Commission has gone too far in permitting utilities to seek recovery of stranded costs, whether such costs are associated with wholesale requirements contracts, with retail-turned-wholesale customers, or with retail customers that obtain retail wheeling.[475] Others argue that the Commission has not gone far enough and that it must broaden the scope of stranded

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[474] Such access may be the open access required under this rule or case-by-case transmission access ordered pursuant to FPA section 211.

[475] We note that the regulations implementing this rule use "wholesale stranded cost" and "retail stranded cost" as shorthand terms to refer to the different situations in which a utility may experience stranded costs. However, as the definitions of those terms make clear, it is *not* the nature of the *costs* (wholesale vs. retail) that is controlling for purposes of stranded cost recovery under this Rule. Rather, the controlling factors are the status of the *customer* (wholesale transmission services customer vs. retail transmission services customer) with whom the costs are associated, and whether the transmission tariffs used by the customer to escape its former power supplier (thus causing the stranding of costs to occur) were required by this Commission or by a state commission. As a result, "retail stranded costs" refers to stranded costs associated with retail wheeling customers.

cost recovery permitted under the Rule. Indeed, some would have us be the guarantor for recovery of all uneconomic costs that might be stranded in the move to more competitive markets, no matter how tenuous the nexus to this Rule, and irrespective of state-Federal jurisdictional complexities. Some support the Commission's decision to recover stranded costs directly from the departing customers. Others would prefer that the Commission require utilities to absorb a portion of their stranded costs or that the Commission spread the burden of stranded costs among all of the utility's customers. Some object that the Commission's approach to stranded costs in the electric industry is different from that adopted in the gas industry. Some entities support the Commission's revenues lost approach for measuring a departing customer's stranded cost obligation. Others propose different methods for computing stranded costs.

Given the plethora of positions that entities have raised both initially and on rehearing concerning stranded costs, the Commission has taken a careful, measured approach with regard to stranded cost recovery. The Commission has balanced a number of important interests in order to achieve what it believes will be a fair and orderly transition to competitive markets. These interests include the financial stability of the electric utility industry, upholding the regulatory bargain under which utilities made major capital investments, and not shifting costs to customers that had no responsibility for causing those costs to be incurred. The Commission also has adopted an approach that, for purposes of stranded cost recovery from wholesale transmission customers, relies on the nexus between stranded costs and the use of transmission tariffs required by this Commission and, for purposes of stranded cost recovery from retail customers, recognizes state commission jurisdiction but fills potential regulatory gaps that could arise in the transition to new market structures.

The balancing of interests and considerations described above is reflected in the following central components of the Rule's stranded cost provisions, which are reaffirmed herein.[476] First, the Commission has determined that the most reasonable, legally supportable approach is one that permits utilities to seek recovery of wholesale stranded costs under this Rule (whether the stranded costs are associated with a departing wholesale requirements customer or with a retail-turned-wholesale customer) only in those cases in which there is a *direct nexus* between the availability and use of Commission-required transmission access[477] and the

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stranding of costs. In order for the utility to be eligible to seek recovery of stranded costs from a departing customer, the customer must have obtained access to a new generation supplier through the use of the former supplying utility's Commission-required transmission tariff (i.e., its open-access tariff or a tariff ordered pursuant to FPA section 211), not through the use of another utility's transmission system.

Other cost recovery issues are more appropriately addressed outside the context of this Rule. For example, the Rule is *not* intended to apply to costs associated with the normal risks of competition, such as self-generation, cogeneration, or loss of load, that do not arise from the new, accelerated availability of Commission-required transmission access. If a customer leaves its utility supplier by exercising

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476 We reaffirm below our basic determinations, but make certain clarifications on limited issues and grant rehearing on the municipal annexation issue.

477 As we explain below, by "Commission-required transmission access" we mean the open-access transmission required under this rule or required pursuant to a section 211 order, as well as transmission provided prior to Order No. 888 (and not pursuant to a section 211 order) where such transmission was provided on a case-by-case basis to comply with the Commission's comparability requirement. See note 484 *infra*.

options that could have been undertaken prior to mandatory transmission under Order No. 888 or the Energy Policy Act, or that do not rely on access to the former seller's transmission, there is no direct nexus to Commission-required transmission access and thus no opportunity for stranded cost recovery under the Rule.

Second, the Commission has limited the opportunity to seek stranded cost recovery under the Rule primarily to two discrete situations: (1) costs associated with customers under wholesale requirements contracts executed on or before July 11, 1994 (referred to in the Rule as "existing wholesale requirements contracts") that do not contain an exit fee or other explicit stranded cost provision; and (2) costs associated with retail-turned-wholesale customers. With regard to the existing wholesale requirements contracts, the Commission also has made a finding that it is in the public interest to permit amendments to add stranded cost provisions to these contracts, even if they contain *Mobile-Sierra* clauses, if case-by-case evidentiary burdens are met. We do not interpret the *Mobile-Sierra* public interest standard as practically insurmountable in extraordinary situations such as this one where historic statutory and regulatory changes have converged to fundamentally change the obligations of utilities and the markets in which they and their customers will operate.

Third, Order No. 888 *does not guarantee* that a utility will be allowed to recover stranded costs. Rather, it provides an *opportunity* for such recovery. To be eligible to recover stranded costs from a departing customer in a particular case, the utility must demonstrate that it incurred costs to provide service to the customer based on a reasonable expectation of continuing service to that customer beyond the contract term.[478] In the case of stranded costs associated with

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[478] We have made a minor revision to the regulatory text, section 35.26(c)(2), to conform the language of that section with sections

wholesale requirements contracts customers, if the contract contains a notice of termination provision, that provision is strong evidence that the parties were aware that at some point in the future the customer might seek to find another supplier. Therefore, there is a rebuttable presumption of no reasonable expectation, and therefore no opportunity for stranded cost recovery unless the utility can overcome the presumption.

The Commission has concluded that direct assignment of stranded costs to the departing customer (through either an exit fee or a surcharge on transmission) is the appropriate method for recovery of stranded costs under the Rule. In reaching this conclusion, the Commission carefully weighed the arguments supporting direct assignment of stranded costs against those supporting a more broad-based approach, such as spreading stranded costs to all transmission users of a utility's system, and also took into account the fact that we applied a different approach in the natural gas area. The central considerations that support a direct assignment approach in the electric industry are that the approach follows the traditional regulatory concept of cost causation, it avoids shifting costs to customers that had no responsibility for causing them to be incurred or for causing them to be stranded, and it is still possible to apply such an approach at this stage of the industry's evolution.

[30,349]

There is no question that, without the stranded cost recovery mechanism, some customers would be far more likely to switch to lower-cost suppliers and enjoy sooner the benefits of a competitive power market. But, as detailed in Order No. 888, such an approach may result in higher costs for other customers. We thus have had to balance the potential for earlier benefits for some customers against other

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35.26(b)(1) and (5). A conforming revision has been made to section 35.26(d)(2)(i).

public interest considerations, most particularly the need to provide a fair mechanism by which utilities can recover the costs of past investments under traditional regulatory concepts of prudently incurred costs and cost causation. The result is not to deny competitive advantages, but only to delay their full realization for some customers so that all customers ultimately will benefit.

While Order No. 888's cost causation approach is different from the Order No. 636 cost spreading approach that was affirmed in the *United Distribution Companies* case, we believe it is the preferable approach given the early stage of the electric utility's competitive transition. We do not read the court's opinion as precluding the Commission from adopting a direct assignment approach in Order No. 888, particularly where, as here, the Commission has fully explained and justified the reasons for following traditional cost causation principles. In addition, although the *United Distribution Companies* court remanded for further consideration (in light of Order No. 636's cost spreading approach) the decision not to require any pipeline absorption of gas supply realignment costs, the Commission has fully explained how its decision in Order No. 888 not to require any utility absorption of stranded costs is consistent with its decision to follow traditional cost causation principles. With respect to the fundamental conclusion that utilities should be permitted an opportunity to recover their prudently incurred costs, Order No. 888 is fully consistent with Order No. 636. Although the Commission in Order No. 888 chose a direct assignment method (rather than the cost-spreading approach in Order No. 636) for purposes of allocating stranded cost responsibility among customers, the approach used by the Commission in Order No. 888 is not governed by decisions in Order No. 636, but in either event the Commission must demonstrate that its choice of methods is based on reasoned decision-making.

In considering the stranded cost issues that may arise in the transition to competitive markets, the Commission also has taken cognizance of significant changes involving retail customers and the stranded cost issues that arise as retail customers convert to wholesale customer status (*e.g.*, through municipalizations) in order to obtain the open access afforded by Order No. 888, or as they obtain retail wheeling required by state commissions. These situations involve new and complex jurisdictional issues and represent the bulk of potential stranded costs facing the industry. We believe it is important to clarify the Commission's decisions as to when it will entertain requests for stranded cost recovery in these situations, and our reasons for doing so.

The Commission's determination that it, rather than the states, should be the primary forum for addressing stranded costs associated with a retail-turned-wholesale customer[479] is limited to those cases in which there is a *direct nexus* between the availability and use of Commission-required transmission access and the stranding of costs. We believe we have both the authority and the obligation to provide an opportunity for stranded cost recovery in these situations because the bundled retail customer would not be able

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[479] In Order No. 888 and here, we sometimes use the shorthand expression "retail-turned-wholesale" customer. By this we do not mean that a retail customer who is an ultimate consumer ceases to be an ultimate consumer, or that this customer begins to purchase electric energy for resale. Rather, in a "retail-turned-wholesale customer" situation, such as the creation of a municipal utility system, a newly-created entity becomes a wholesale power purchaser on behalf of retail customers who were formerly bundled customers of the historical local utility power supplier. The new municipal utility is the conduit by which retail customers, if they cannot obtain direct retail access, can reach power suppliers other than their historical local utility power supplier. Although the retail customers remain bundled retail customers, in that they become the bundled customers of the new entity, we call this a "retail-turned-wholesale customer" situation because the new entity in effect "stands in the shoes" of the retail customers for purposes of obtaining wholesale transmission access and new power supply.

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to obtain access to the new supplier *but for* the Commission's order requiring transmission. The creation of a new wholesale entity to purchase power on behalf of retail customers would not, by itself, trigger stranded costs. In the absence of transmission access from the historical supplier of the retail customers, the new entity would ~~have to~~ remain on the historical supplier's generation system because it would have no way to reach other power suppliers, and stranded costs would not occur.[480] Therefore, there is a causal nexus between the stranded costs and the availability and use of the tariff services *required by the Commission.*[481] Moreover, because of this causal nexus between the use of a jurisdictional utility's Commission-required transmission tariff and the potential for foregone revenues by that jurisdictional utility as a result of the Commission-required access, the stranded costs associated with a retail-turned-wholesale customer are properly viewed as economic costs that are jurisdictional to this Commission.

In contrast, in the situation in which a bundled retail customer obtains retail wheeling, stranded costs are directly

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[480] Exceptions would be self-generation or construction by the new entity of its own transmission line, in which case, as noted earlier, the stranded cost provisions of Order No. 888 would not apply because such options have always been available as alternatives to purchasing power from the historical supplying utility and do not involve the use of the utility's transmission facilities under an open-access tariff. Thus the departure of customers under these circumstances cannot be linked to the open-access requirements of this Rule.

[481] As discussed in greater detail in sections IV.J.6 and IV.J.12 below, we clarify that the opportunity for recovery of stranded costs in a retail-turned-wholesale situation is limited to cases in which the former bundled retail customer subsequently becomes, either directly or through another wholesale transmission purchaser, an unbundled wholesale transmission services customer of its former supplier. We have revised section 35.26(b)(1)(i) of the Commission's regulations accordingly.

caused by the availability and use of unbundled retail services *required by the state commission*, not this Commission.[482] Thus, the Commission believes that states, not the Commission, should be the primary forum for costs associated with a bundled retail customer that obtains retail wheeling. The Commission's decision to entertain requests to recover stranded costs caused by retail wheeling in *only* a limited circumstance (where the state regulatory authority does not have authority under state law to address stranded costs when the retail wheeling is required) is based on a policy decision by this Commission that it will step in to fill a regulatory "gap" that could result in no effective forum in which utilities would have an opportunity to seek recovery of prudently incurred costs.

Finally, after considering various proposals regarding how stranded costs should be calculated, and reviewing the arguments of petitioners on rehearing, the Commission continues to believe that the revenues lost approach is the fairest and most efficient way to determine the amount of stranded cost assigned to a departing customer during the transition to a competitive wholesale bulk power market. The Commission has rejected an asset-by-asset approach as overly complicated and costly.

We respond below to the specific arguments raised on rehearing and elaborate on the above determinations.

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[482] Unbundled retail transmission services required by a state commission could be taken under the same *pro forma* open-access tariff used by wholesale customers or, if determined appropriate by the Commission, under a separate retail tariff filed at the Commission. The critical point, however, is that in either case, the unbundled services are required by the state and not by this Commission.

Rehearing Requests Opposing Retail-Turned-Wholesale Jurisdiction

A number of entities challenge the Commission's assertion that costs associated with retail-turned-wholesale customers would not be stranded but for the FERC-jurisdictional transmission access requirement. They assert that the condition precedent to municipalization is the operation of a state process, and thus that it cannot be the case that the recovery of costs caused by a retail-turned-wholesale customer is "not subject to regulation by the States." They submit that such costs would not be stranded but for the action of state legislators or state regulators in granting authority for the customer's status change. They argue that any nexus that the Commission's authority under the FPA has to wholesale transmission services subsequently provided to the new

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wholesale customer is entirely derivative of the state's action.[674]

A number of entities argue that jurisdiction over costs that are stranded when a retail customer becomes a wholesale customer should be left to the states because the facilities used to provide retail service to these retail customers were subject to state jurisdiction and were included in retail rate base when the service was rendered.[675] They argue that because the Commission had no jurisdiction over the public utility facilities and costs incurred to serve retail-turned-wholesale customers, it has no jurisdiction to address those public utility costs if they become stranded. Thus, according

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[674] *E.g.*, NARUC, TAPS, Nucor, Suffolk County, IL Com, Multiple Intervenors, APPA, CAMU, WI Com, NASUCA.

[675] *E.g.*, ELCON, IL Com, IN Com, American Forest & Paper, AR Com, MO/KS Coms, NJ BPU, Suffolk County, WY Com, VA Com, FL Com, NARUC, TAPS.

to these entities, the conversion of the customer from retail to wholesale does not simultaneously effectuate a conversion of the costs from retail to wholesale.

AR Com and MO/KS Coms submit that jurisdiction over the costs incurred for historical retail customers does not shift unless the parties themselves make those costs a part of their new wholesale contract. NY Com submits that the Commission should recognize the states' jurisdiction to set the *level* of stranded costs associated with retail-turned-wholesale customers to be recovered in wholesale transmission rates set by FERC. FL Com asserts that state authorities are in a better position to assess the extent of stranded facilities and their costs, and that the Commission's involvement should be limited to that requested by a state by petition.

OH Com states that the Commission's position on stranded costs associated with retail-turned-wholesale customers invites second-guessing of state commission determinations and encourages forum shopping by introducing more than one stranded cost treatment within a single state jurisdiction. It expresses concern that utilities may seek to creatively disaggregate into generation, transmission, and distribution companies in ways to deliberately recast traditional retail relationships as wholesale in an effort to obtain favorable regulatory treatment of stranded costs.

IN Com submits that Order No. 888's treatment of stranded costs associated with retail-turned-wholesale customers will discourage state legislatures from making municipalization more available. VT DPS and Valero argue that the threat of a stranded cost surcharge will erect a new barrier to the formation of municipal utilities. They note that the rule refers to one commenter's observation that, if Otter Tail could have made a stranded cost claim against the municipal utility that Elbow Lake planned to create, Otter Tail would not have needed to refuse to wheel and there

would never have been an *Otter Tail* case. They submit that the Commission never addressed whether, or why, it believed the point to be wrong.

VT DPS and Valero also assert that the rule represents a major inconsistency with prior Commission treatment of municipalization. They submit that the Commission historically promoted franchise competition between municipalities and utilities by holding tariff provisions that restrict such competition to be anticompetitive and unreasonable.[676]

American Forest & Paper submits that recovery of 100 percent of stranded costs caused by municipalization is inconsistent with the Commission's actions in the natural gas industry, where the Commission has encouraged competition at the retail level through competitive bypass and has not created barriers to competitive entry by imposing transition charges or exit fees on converting customers.[677]

Nucor objects that the rule does not address the substantive findings, the common sense rationale, or the jurisdictional distinction drawn in *United Illuminating*.[678]

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It contends that the Commission's observation in Order No. 888 that there may not be a state regulatory forum for the recovery of stranded costs associated with retail-turned-wholesale customers and hence that the Commission should

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[676] VT DPS and Valero cite in this regard *Florida Power & Light Company*, 8 FERC ¶61,121 (1979); *Power Authority of the State of New York v. FERC*, 743 F.2d 93 (2d Cir. 1984); *Metropolitan Transportation Authority v. FERC*, 796 F.2d 584 (2d Cir. 1986).

[677] American Forest & Paper cites in support of its position *Great Lakes Gas Transmission Limited Partnership*, 68 FERC ¶61,376 (1994).

[678] *United Illuminating Company*, 63 FERC ¶61,212, *reh'g denied*, 64 FERC ¶61,087 (1993) (*United Illuminating*).

be the primary forum for addressing such stranded costs is flawed because there always is a state forum to address such cost recovery (the adequacy of the relief provided is a very distinct issue) and open-access transmission does not and cannot cause retail competition to occur.[679]

Commission Conclusion

We will reject the requests for rehearing of our decision to be the primary forum for addressing the recovery of stranded costs caused by retail-turned-wholesale customers. We find the requests for rehearing on this issue unpersuasive. While it may be the case, as some entities suggest, that state action is a condition precedent to municipalization, the rehearing petitions ignore the fact that the rule covers situations in which open access is *also* a condition precedent to the municipalized customers leaving their existing supplier's system. Order No. 888 does not propose that the Commission be the primary forum for stranded cost recovery for all cases of municipalization. Instead, our holding is limited to those cases in which the new wholesale entity uses Commission-mandated transmission access to obtain new power supply on behalf of retail customers that were formerly supplied power by the utility providing the transmission service.[680]

As we explained in Order No. 888, in such cases there is a direct nexus between the FERC-jurisdictional transmission access requirement and the exposure to non-recovery of costs

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[679] *See also* Suffolk County Rehearing (Commission's analysis in *United Illuminating* was correct; nothing has changed to warrant the Commission's rejection of that analysis).

[680] In the case of municipalization, the bundled retail customers of a local utility become the bundled retail customers of the new municipal utility. As explained above, we call this a "retail-turned-wholesale customer" situation because the new municipal entity in effect "stands in the shoes" of the retail customers for purposes of obtaining wholesale transmission access and new power supply.

stranded as a result of this wholesale transmission access. Thus, the stranded costs associated with retail-turned-wholesale customers for which Order No. 888 provides an opportunity for recovery would not have been incurred *but for* the action of this Commission in requiring a utility to make unbundled transmission services available. In these cases, the former bundled retail customers of the historical supplying utility (now the bundled retail customers of the new municipal system) would not have obtained access to new power supply *but for* the Commission's order mandating transmission. Without the regulatory mandate to provide access, the utility would have indirectly continued sales to the same retail customers because the new municipal utility purchasing power on the retail customers' behalf would have had no way to reach other power suppliers. In this situation, there would be no stranded generation costs. In other words, the creation of a municipal utility intermediary to purchase power at wholesale would not, by itself, trigger stranded costs. Rather, it is the access from the historical supplier of the bundled retail customers that is the condition precedent to reaching other power suppliers and thereby triggering stranded costs. Therefore, there is a clear causal nexus between the stranded costs and the availability and use of the tariff *required by the Commission.*

Costs that are exposed to nonrecovery when a retail customer or a newly-created wholesale power sales customer ceases to purchase power from the utility and *does not* use the utility's transmission system to reach a new generation supplier (*e.g.*, through self-generation or use of another utility's transmission system) do not meet the definition of "wholesale stranded costs" for which the rule provides an opportunity for recovery. Such costs are outside the scope of the rule because such costs would not be stranded as a direct result of the new open access.

In response to the argument that conversion of a customer from retail to wholesale would not simultaneously

effectuate a conversion of the costs from retail to wholesale, we believe this argument confuses

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the issue. We note that we have defined stranded costs as wholesale or retail on the basis of whether wholesale or retail open access is the cause of the costs being stranded, not on the basis of the original retail or wholesale characteristic of the costs. Thus, even though costs may have been originally incurred as retail-related costs, the precipitating event that results in such costs being stranded in the retail-turned-wholesale customer scenario is the use by the new wholesale customer of the Commission-mandated tariff. When a customer is able to use the Commission-required tariff to reach another generation supplier, it causes the utility to incur an economic cost in providing transmission service that is equal to the foregone revenues that the utility reasonably expected to receive under a state regulatory regime. Thus, because of the causal nexus between the use of a former supplying utility's Commission-mandated transmission tariff and the potential for foregone revenues by that utility as a result of the Commission-required access, the costs stranded by a retail-turned-wholesale customer are properly viewed as economic costs that are jurisdictional to this Commission.

In response to those entities that express concern that the Commission's position on stranded costs associated with retail-turned-wholesale customers invites second-guessing of state commission determinations, we emphasize that we have assumed primary authority to address such costs only in a limited category of cases where there is a direct nexus between the availability of Commission-required open access and the stranding of costs when the former customer uses the former supplying utility's transmission system (through its open-access tariff or a section 211 order) to reach a new supplier. We indicated in Order No. 888 that if the state has permitted any recovery from departing retail-turned-wholesale customers, such amount will not be stranded for

purposes of this Rule. We will deduct that amount from the costs for which the utility will be allowed to seek recovery under this rule from the Commission. In so doing, however, we are not second-guessing the states as to what a utility may recover under state law. Additionally, we will give great weight in our proceedings to a state's view of what might be recoverable.

We also reject the argument that the Commission's position on stranded costs associated with retail-turned-wholesale customers encourages forum shopping. To the contrary, as we said in Order No. 888, to avoid forum shopping and duplicative litigation of the issue, we expect parties to raise claims before this Commission in the first instance. We believe that this Commission should be the primary forum because, without the open access provided by the Rule, the new municipal utility would not be able to reach a new supplier and, as a result, would not cause the utility to incur stranded costs (as defined in this Rule).

We reject as misplaced arguments that the rule represents a major inconsistency with the Commission's historical promotion of franchise competition between municipalities and utilities and that it will discourage municipalization.[681] It continues to be the Commission's policy to encourage competition. Indeed, the goal of Order

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[681] In response to VT DPS and Valero, we note that whether or not Otter Tail may have agreed to wheel power for the municipal utility that Elbow Lake planned to create if Otter Tail could have made a stranded cost claim against that municipal utility is of no moment to the Commission's decision in Order No. 888 to allow utilities the opportunity to seek recovery of stranded costs associated with retail-turned-wholesale customers. The Court in *Otter Tail* did not address the stranded cost issue because it was not presented in that case. Nor was the Court presented with the extraordinary circumstances—the historic statutory and regulatory changes, including the requirement of open access, that have converged to fundamentally change the obligations of utilities and the markets in which they operate—that have justified this Commission's Order No. 888 stranded cost policy.

No. 888 is to remove impediments to competition in the wholesale bulk power marketplace and to bring more efficient, lower cost power to the Nation's electricity consumers. However, the purpose of the stranded cost policy is neither to encourage nor to discourage municipalization, but rather to facilitate a fair transition to competition and to ensure stability in the industry during that transition. As we discuss elsewhere in this order, we believe that this Commission must address the recovery of the costs of moving from a monopoly-regulated regime

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to one in which all sellers can compete on a fair basis and in which electricity is more competitively priced. On this basis, we believe that if a new wholesale entity such as a municipal utility uses Commission-required open access to reach a new supplier on behalf of its retail customers (previously retail customers of the former supplier), the former supplying utility should be given an opportunity to recover legitimate, prudent and verifiable costs that it incurred under the prior regulatory regime to serve that customer.

In response to American Forest & Paper's argument that recovery of 100 percent of stranded costs caused by municipalization is inconsistent with the Commission's policy in the natural gas industry of allowing competitive bypass without imposing transition charges or exit fees on converting customers, we note that industrial gas customers who bypass a local distribution company's (LDC) facilities do not escape transition costs quite so easily as suggested by American Forest & Paper. It is true that, when the end-user bypasses the LDC to reach an interstate pipeline different from the pipeline serving the LDC, the Commission views the bypass as a risk of competition from which the LDC should not be shielded.[682] However, when the end-user

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682 *Texas Gas Transmission Corporation*, 65 FERC ¶61,275 (1993).

bypasses the LDC to reach the same interstate pipeline that serves the LDC, the Commission may take certain actions to minimize adverse effects on the LDC and its remaining customers.[683] Moreover, an end-user that bypasses an LDC to reach the same pipeline that serves the LDC would, in any event, be allocated a share of the pipeline's gas supply realignment costs (if any), since those costs are allocated based on current contract demand (or usage).[684] Accordingly, we see no inconsistency between our bypass policy for the natural gas industry and Order No. 888's treatment of stranded costs associated with retail-turned-wholesale customers. Similar to our refusal to shield LDCs from the adverse effects of an end-user's bypass to reach a different pipeline than serves the LDC, Order No. 888 does not provide an opportunity for stranded cost recovery where a retail-turned-wholesale customer uses another utility's transmission system to reach a new supplier. As we note above, the opportunity for recovery of stranded costs associated with retail-turned-wholesale customers is limited to those cases in which the former retail customer obtains (either directly or through another wholesale transmission purchaser) unbundled transmission services from its former supplying utility. In the case of an end-use customer bypassing the LDC to reach the same pipeline that serves the LDC, the end-use customer would similarly be allocated a

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683 *Texas Gas Transmission Corporation*, 69 FERC ¶61,245, *reh'g*, 70 FERC ¶61,207 (1995) (requiring pipeline to offer LDC a reduction in its contract demand).

684 *See Southern Natural Gas Company*, 75 FERC ¶61,046, at p. 61,158 (1996); *Arcadian Corporation v. Southern Natural Gas Company*, 67 FERC ¶61,176, at p. 61,538 (1994). *See also United Distribution Companies*, 88 F.3d at 1181. As the *United Distribution Companies* court noted, the Commission has given an LDC relief (and required the bypassing customer to bear its share of transition costs) if the LDC can show a direct nexus between the bypass and the pipeline, although the Commission has declined to adopt a generic rule addressing this issue. 88 F.3d at 1180-81.

share of the pipeline's gas supply realignment costs. As a result, American Forest & Paper's attempt to rely on the Commission's gas bypass policy is misplaced.

We also disagree with those entities that argue that the Commission has failed to adequately distinguish Order No. 888's treatment of stranded costs associated with retail-turned-wholesale customers with the Commission's decision in *United Illuminating*. As we stated in Order No. 888, we recognize that we took a different approach to stranded cost recovery associated with retail-turned-wholesale customers in *United Illuminating*, where we suggested that state and local regulatory authorities or the courts should be able to provide an adequate forum to address retail franchise matters, including recovery of stranded costs caused by municipalization, but said we would consider revisiting the question if United Illuminating could demonstrate the lack of a forum.[685] However, we explained that since the issuance of that decision we have had an opportunity to re-analyze the nature of the stranded cost problem when a retail customer

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becomes a wholesale customer, including the potential that there might not be a state regulatory forum for recovery of such costs. In these circumstances, we have determined that where such costs are stranded as a direct result of Commission-mandated wholesale transmission access, these costs should be viewed as costs of the transition to competitive wholesale bulk power markets and this Commission should be the primary forum for addressing their recovery.

In response to Nucor's objection that there always is a state forum to address stranded cost recovery associated with retail-turned-wholesale customers, with the adequacy of the relief being a distinct issue, we clarify that our primary

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[685] 63 FERC at pp. 62,583-84.

concern in retail-turned-wholesale situations is not whether there is an adequate state regulatory forum for the recovery of stranded costs associated with retail-turned-wholesale customers. Rather, our primary concern is that wholesale customers (whether or not formerly retail) should be responsible for the costs incurred to meet their power needs that are stranded when they use the wholesale transmission ordered by this Commission to reach new suppliers. Our decision to be the primary forum in the case of stranded costs associated with retail-turned-wholesale customers is based on the causal nexus between regulatory-mandated wholesale transmission access and the stranding of costs when a new municipal utility uses such access to obtain new power supply on behalf of retail customers previously served by the former supplying utility.

Rehearing Requests Seeking Expansion of Retail-Turned-Wholesale Jurisdiction

Other entities seek rehearing of the Commission's decision not to be the primary forum for stranded cost recovery in situations in which an existing municipal utility annexes territory served by another utility or otherwise expands its service territory.[686] A number of them argue that the loss of existing retail customers through municipal annexations or expansions is no different from the loss of retail customers through new municipalization because existing municipal systems are likely to use Commission-jurisdictional open-access transmission to obtain resources to supply power to the annexed loads.[687] They submit that, just

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[686] *E.g.*, EEI, SoCal Edison, Centerior, Atlantic City, PSE&G, Puget, Public Service Co of CO, Coalition for Economic Competition.

[687] *E.g.*, EEI, SoCal Edison, PSE&G, Puget, Public Service Co of CO, Coalition for Economic Competition. Coalition for Economic Competition suggests, for example, that villages and large industrial customers may opt to join existing municipal systems that, in most cases, will use Commission-jurisdictional transmission tariffs to obtain resources to supply power to the annexed loads.

as with newly-municipalized customers, such costs would not be stranded but for the action of this Commission.

Some of these entities express concern that the rule will encourage retail-turned-wholesale transactions to be undertaken as annexations rather than through the formation of new entities to avoid stranded costs.[688] Public Service Co of CO contends that Order No. 888, in conjunction with the Commission's section 211 order in *American Municipal Power Ohio, Inc.*,[689] may facilitate municipal annexations by enabling municipal systems to serve new territory through the establishment of second delivery points.

Coalition for Economic Competition and Puget also argue that the Commission must consider stranded costs that arise from municipal expansion in order to satisfy its statutory obligation under the FPA to "set just and reasonable" rates. They contend that there is no justification for charging one rate to former retail customers taking transmission services through a new municipal utility and another rate to those taking service through municipal annexation or through use of another utility's transmission system.

PSE&G suggests that the distinction between new municipalization on the one hand and municipal annexation or expansion on the other hand may lead to unnecessary controversy and litigation as entities wrangle over whether a given expansion/annexation is really an expansion or a municipalization. It says that a situation could arise where a municipality

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[688] *E.g.*, EEI, Coalition for Economic Competition, Atlantic City, Puget, Public Service Co of CO.

[689] 74 FERC ¶61,086, *final order directing transmission service*, 76 FERC ¶61,265 (1996).

serves one town in order to serve thousands of additional customers in a second town. According to PSE&G, it is not clear from the rule whether the Commission would consider this an expansion of a municipality's service territory or a new municipalization.

Puget submits that the stranded cost recovery mechanism must not be subject to being frustrated by simple artifices such as having the new supplier (instead of the departing customer) request and contract for transmission service. SoCal Edison seeks clarification of the Commission's authority to mandate stranded cost recovery if a retail customer disconnects from a utility's system and accesses another generation supplier by interconnecting with a public power entity (who in turn would interconnect with a neighboring jurisdictional utility). It asks the Commission to clarify that such a transaction effectively constitutes a municipalization, not an expansion of a service territory, and that the Commission, under FPA section 211, can compel the recovery of stranded costs by having the "new" jurisdictional utility assess a stranded cost charge and pass the revenues on to the utility from whose system the customer departed.

SoCal Edison seeks several additional clarifications. It states that it understands that the Commission's primary forum status in no way prevents or interferes with a state's authority to order stranded cost recovery from departing retail customers. If this is not the case, SoCal Edison seeks rehearing on this issue. SoCal Edison also asks the Commission to clarify that the Commission retains the discretion to defer to a state stranded cost calculation methodology if appropriate to do so on the facts of a particular case.

Commission Conclusion

We have carefully reviewed the arguments made by petitioners seeking rehearing of our decision not to be the primary forum for stranded cost recovery in the case of

municipal annexations. Based on that review we have decided to reconsider our decision. This conclusion is based in large part upon the very significant similarities between the creation of a *new* municipal utility system (also referred to as municipalization) and the expansion of an *existing* municipal utility system (*e.g.*, through annexation of additional retail service territory). We recognize that the *same nexus* to Commission-required transmission access that forms the basis for our decision to allow a utility to seek stranded cost recovery in cases of new municipalization—use of the former supplying utility's transmission system—is likely to be present in some cases of municipal annexation. In the case of both new municipalizations and annexations, the bundled retail customers of a local utility become the bundled retail customers of a municipal utility (in one case a new municipal utility, in the other an existing municipal utility) *that will use the transmission system of the retail customers' former supplier in order to access other suppliers.*

As we explain above, in a "retail-turned-wholesale customer" situation, such as the creation of a municipal utility system, a newly-created entity becomes a wholesale power purchaser on behalf of the retail customers. It is the conduit by which retail customers, if they cannot obtain direct retail access, can reach power suppliers other than their historical local utility power supplier. Although the retail customers remain bundled retail customers, in that they become the bundled customers of the new entity, we call this a "retail-turned-wholesale customer" situation because the new entity in effect "stands in the shoes" of the retail customers for purposes of obtaining wholesale transmission access and new power supply. The same analogy applies to newly-annexed customers; they become "new" wholesale customers in the sense that the wholesale entity obtains transmission and new power supply on their behalf.

Accordingly, we clarify that this Commission will be the primary forum for addressing the recovery of stranded costs if an existing municipal utility uses the transmission system of its annexed retail customers' former supplier to access new suppliers to serve the annexed load. As long as Commission-required transmission access (the former supplier's open-access tariff or transmission services ordered under FPA section 211) is the vehicle that enables an existing municipal utility to obtain power supplies to serve annexed loads, we believe that any costs stranded as a result of this wholesale transmission access are properly viewed as economic costs that are jurisdictional to this Commission.

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In such a case, the bundled retail customers that are annexed by an existing municipal utility would, through the municipal utility, use the transmission system of their former supplier to obtain access to new supplies and thereby expose their former supplier to non-recovery of prudently incurred costs. As in the case of new municipal systems that use the transmission system of their retail customers' former supplier, such costs would not be stranded *but for* the action of this Commission in requiring a utility to make unbundled transmission services available.[690]

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690 SoCal Edison requests clarification that a transaction in which a retail customer disconnects from a utility's system and accesses another generation supplier by interconnecting with a public power entity, who in turn would interconnect with a neighboring jurisdictional utility, constitutes a municipalization, not an expansion of a service territory. Because we have decided to treat municipal annexations (or expansions) and new municipalizations similarly for purposes of stranded cost recovery under the Rule, SoCal Edison's request is moot to the extent that it envisions a scenario in which the former supplier's transmission system is used to access a new generation supplier. However, as discussed below, the rule would not provide an opportunity to seek recovery of stranded costs if the municipal entity in the scenario described by SoCal Edison *does not* use the former supplier's transmission system.

Just as we will not be the primary forum for stranded cost recovery for *all* new municipalizations, so also we will not be the primary forum for stranded cost recovery for *all* cases of municipal annexation. Instead, our holding is limited to those cases in which the existing municipal system uses Commission mandated transmission access from the annexed customers' former supplying utility to obtain power from a new supplier. Costs that are exposed to nonrecovery when an existing municipal utility *does not* use the transmission system of the retail customers' former supplier to reach a new generation supplier (*e.g.*, through self-generation or use of another utility's transmission system) do not meet the definition of "wholesale stranded costs" for which the rule provides an opportunity for recovery. Such costs are outside the scope of the rule because such costs would not be stranded as a direct result of Commission-required transmission access.

We reject as misplaced the argument that the Commission, by failing to address costs that arise if a municipal utility (whether a new municipal utility or an existing municipal utility that annexes additional retail customer territory) does not use the historical supplying utility's transmission system, has not met its statutory obligation to "set just and reasonable" rates. The Commission in this rulemaking has not determined any utility's just and reasonable rates. Further, Order No. 888 does not by its terms bar the recovery of costs that do not result from the use of Commission-required transmission access. Utilities may, as before, seek recovery of such non-open-access-related costs on a case-by-case basis in individual rate proceedings. The Commission will not prejudge those issues here.

As we indicated in Order No. 888, we also are concerned that there may be circumstances in which customers and/or utilities could attempt, through indirect use of open-access transmission, to circumvent the ability of any regulatory

commission—either this Commission or state commissions—to address recovery of stranded costs.[691] We reiterate that we reserve the right to address such situations on a case-by-case basis.

We share the concern expressed by Puget that a retail-turned-wholesale customer should not be allowed to avoid any stranded cost obligation that it may have under Order No. 888 simply by having its new supplier be the entity that requests and contracts for transmission service from the former supplying utility. We clarify that the opportunity for recovery of stranded costs associated with retail-turned-wholesale customers under Order No. 888 applies if the transmission system of the former supplier is used to transmit the newly obtained power supplies to the departing retail customer, regardless of whether the customer *or* its new supplier is the actual entity that requests and contracts for the unbundled transmission service. We have revised the definition of "wholesale stranded cost" in section 35.26(b)(1)(ii) accordingly to include

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the situation in which the retail customer subsequently becomes, either directly or through another wholesale transmission purchaser, an unbundled wholesale transmission services customer of the former supplying utility.

We clarify in response to SoCal Edison's request that our decision to be the primary forum for recovery of stranded costs from retail-turned-wholesale customers is not intended to prevent or to interfere with the authority of a state to permit any recovery from departing retail customers, such as by imposing an exit fee prior to creating the wholesale entity. As we indicated in Order No. 888, if the state has permitted any such recovery from a departing retail-turned-wholesale

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691 *FERC Statutes and Regulations, Regulations Preambles January 1991-June 1996* at p. 31,819; *mimeo* at pp. 536-37.

customer, that amount will not in fact be stranded. Accordingly, we will deduct that amount from the costs for which the utility will be allowed to seek recovery from this Commission.[692]

We clarify in response to SoCal Edison's request that the Commission has the discretion to defer to a state stranded cost calculation methodology. However, because we recognize that state retail access plans may present questions that need to be addressed on a case-by-case basis, we will consider whether to exercise that discretion on a case-by-case basis.

7. Recovery of Stranded Costs Caused by Retail Wheeling

In Order No. 888, we concluded that both this Commission and the states have the legal authority to address stranded costs that result when retail customers obtain retail wheeling in order to reach a different generation supplier, and that utilities are entitled, from both a legal and a policy perspective, to an opportunity to recover all of their prudently incurred costs.[693] We explained that this Commission's authority to address retail stranded costs (i.e., stranded costs associated with retail wheeling customers) is based on our jurisdiction over the rates, terms, and conditions of unbundled retail transmission in interstate commerce by public utilities, and that the authority of state commissions to address retail stranded costs is based on their jurisdiction over local distribution facilities and the service of delivering electric energy to end-users. Because it is a state decision to permit or to require the retail wheeling that causes stranded costs to occur, we decided we generally will leave it to state regulatory authorities to deal with any stranded costs

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692 *FERC Statutes and Regulations, Regulations Preambles January 1991-June 1996* at p. 31,819; *mimeo* at p. 537.

693 *FERC Statutes and Regulations, Regulations Preambles January 1991-June 1996* at pp. 31,824-26; *mimeo* at pp. 553-58.

occasioned by retail wheeling. The only circumstance in which we will entertain requests to recover stranded costs caused by retail wheeling is when the state regulatory authority[694] does not have authority under state law to address stranded costs when the retail wheeling is required. In such a case, we will permit a utility to seek a customer-specific surcharge to be added to an unbundled transmission rate.

We noted that most states have a number of mechanisms for addressing stranded costs caused by retail wheeling. We indicated that rates for services using facilities used in local distribution to make a retail sale are state-jurisdictional, and that states will be free to impose stranded costs caused by retail wheeling on facilities or services used in local distribution. We also said that states may use their jurisdiction over local distribution facilities or services to recover so-called stranded benefits.

We stated that we believe our approach to stranded costs associated with retail wheeling customers represents an appropriate balance between federal and state interests that ensures that the rates for transmission in interstate commerce by public utilities (except in a narrow circumstance) will not be burdened by retail costs.

We expressed concern about the cost-shifting potential in a holding company or other multi-state situation, where denial

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694 "State regulatory authority" has the same meaning as provided in section 3(21) of the FPA:

> " 'State regulatory authority' has the same meaning as the term 'State commission', except that in the case of an electric utility with respect to which the Tennessee Valley Authority has ratemaking authority (as defined in section 3 of the Public Utility Regulatory Policies Act of 1978), such term means the Tennessee Valley Authority."

of retail stranded cost recovery by a state regulatory authority could, through operation of the reserve equalization formula in a Commission-jurisdictional intra-system agreement, inappropriately shift the disallowed costs to affiliated operating companies in other states. We said that we will deal with such situations if they arise pursuant to public utility filings under section 205 or complaints under section 206. Thus, the need to amend a jurisdictional agreement to prevent stranded costs associated with retail wheeling customers from being shifted to customers in other states will be addressed on a case-by-case basis. We encouraged the affected state commissions in such situations to seek a mutually agreeable approach to this potential problem. If such a consensus solution resulted in a filing to modify a jurisdictional agreement, we indicated that we would accord such a proposal deference, particularly if other interested parties support the filing. In the event that the state commissions and other interested parties cannot reach consensus that would prevent cost shifting, we said that the Commission would ultimately have to resolve the appropriate treatment of such stranded costs.

Rehearing Requests Opposing Any Commission Involvement in Stranded Costs Associated With Retail Wheeling Customers

A number of entities dispute the Commission's statement that both it and the states have the legal authority to address stranded costs that result from retail wheeling. Central Illinois Light contends that the Commission's claim of dual jurisdiction is inconsistent with *FPC v. Southern California Edison Company.*[695] It says that the court in that case recognized that Congress meant to draw a bright line easily ascertained between state and federal jurisdiction, making unnecessary case-by-case analysis. Central Illinois

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[695] 376 U.S. 205, 215-16 (1964).

Light asserts that the Commission has stepped over the bright line into the states' exclusive jurisdiction over retail rates.

IA Com seeks rehearing of the Commission's assertion of concurrent jurisdiction with state authorities over stranded costs associated with retail wheeling customers on the ground that it is based on the Commission's erroneous assertion of jurisdiction over unbundled retail transmission.

IL Com says that regardless of whether the Commission's claim of jurisdiction over retail transmission is upheld, the Commission's ruling that there is joint jurisdiction over retail stranded costs is in error. According to IL Com, the Commission has no authority over such stranded costs. IL Com also disputes the Commission's characterization of the derivation of state authority to address such stranded costs. It says that state commission authority does not derive only from states' jurisdiction over local distribution facilities and the service of delivering electric energy to end-users. IL Com submits that state commission authority to address retail stranded costs derives from the existence of state commission jurisdiction over the facilities and costs at the time of their incurrence.

A number of entities contend that Commission jurisdiction over transmission facilities used in interstate commerce does not give it jurisdiction over stranded investment in retail generating assets.[696] Several argue that the fact that a retail wheeling customer might need transmission access from its former supplier does not change

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[696] *E.g.*, Central Illinois Light, IN Consumer Counselor, IN Consumers, Nucor, FL Com, WI Com, VA Com, AR Com, MO/KS Com, OH Com, APPA. For example, FL Com asserts that costs for facilities that are currently under the jurisdiction of state authorities do not become the Commission's jurisdiction because retail wheeling is instituted; in most cases, the states approved both the construction and the cost recovery for these facilities under bundled rate structures. FL Com submits that the states are in a better position to judge the extent and value of assets that may become stranded as a result of retail wheeling.

the character of the costs that are stranded. They maintain that retail stranded costs are not costs of providing unbundled transmission service, but are costs associated with providing what was formerly bundled retail service, over which the Commission has no jurisdiction.[697]

Several entities argue that it is solely the action of the state that allows a given

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utility's retail customers to seek alternative sources of supply; therefore, there is no nexus between the Commission's wholesale transmission rule and any costs that might be stranded by a state-established customer choice regime.[698]

A number of entities submit that the provision of FPA section 201 that federal regulation is "to extend only to those matters which are not subject to regulation by the States" bars any attempt by the Commission to displace or supplant an admittedly legitimate exercise of state authority over retail stranded costs.[699] NASUCA submits that all state commissions have the authority to establish just and reasonable rates for the retail electric utilities in their respective jurisdictions.[700] It maintains that only state

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[697] *E.g.*, APPA, AR Com, MO/KS Coms, OH Com.

[698] *E.g.*, NARUC, TAPS.

[699] *E.g.*, NASUCA, NY Com, WY Com, NARUC. The Consumer's Utility Counsel Division of the Georgia Governor's Office of Consumer Affairs filed comments on June 24, 1996, in support of NARUC's request for rehearing on the jurisdictional issues pertaining to the recovery of retail stranded costs. While answers to requests for rehearing generally are not permitted, 18 C.F.R. §385.213(a)(2) (1996), we will depart from our general rule because of the significant nature of this proceeding and will accept these comments.

[700] According to NASUCA, whether or not that authority includes a requirement that a utility receive 100 percent return on stranded costs (or

regulators are in a position to rule on the treatment of costs that were allowed in retail rates pursuant to state laws; the Commission has no knowledge or expertise regarding the specific state legal frameworks in which these costs were included in rates. NY Com argues that the Commission does not have jurisdiction to determine the rate treatment of costs devoted to retail service and, thus, lacks authority to allow recovery if a state decides not to do so.

VA Com argues that section 201(b)(1) of the FPA restricts the Commission's jurisdiction to wholesale sales. It says that a departing retail customer remains a retail customer, regardless of the supplier. VA Com concludes that no portion of the transaction is a wholesale sale, and that there are no wholesale costs associated with a retail wheeling transaction.[701]

A number of entities seek rehearing of the Commission's decision that it will entertain stranded cost claims when the state regulatory authority does not have authority under state law to address stranded costs when the retail wheeling is required.[702] NARUC submits that Congress did not intend the Commission to become involved in adjudicating legal questions regarding the breadth of state law authority granted state commissions by their legislatures. NARUC expresses concern that the Commission would second-guess a state cost recovery determination and promote forum shopping. Once a balance has been struck at the state level concerning the terms of restructuring, NARUC submits that it is inconceivable that the Commission would have either the

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something less) is a matter to be determined by the state courts and legislatures.

[701] *See also* AR Com (one retail transaction is replaced by another retail transaction; there is no wholesale transaction and no wholesale costs over which the Commission has jurisdiction).

[702] *E.g.*, NARUC, Central Illinois Light, IN Com, American Forest & Paper, IN Consumer Counselor, IN Consumers, IL Com.

desire or authority to second-guess a state's legislative and regulatory processes.

Several entities object that the Commission effectively would authorize recovery of stranded costs associated with a retail wheeling customer if a state legislature withholds from the state regulatory agency the authority to approve stranded cost recovery.[703] They submit that just because a state has not given its regulatory commission the authority to impose stranded costs in the case of retail wheeling does not confer jurisdiction on the Commission to impose such charges. They contend that the state legislature should be the final arbiter of state policy. IL Com submits that if a state legislature chooses not to give its state commission the authority to act on stranded costs, "that can be taken as a clear indication that the state's legislature most certainly does *not* want FERC to address them."[704] Central Illinois Light objects that the Commission has offered no reason why it will accept the decision of the

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regulatory agency, but not that of the legislature.

AMP-Ohio and Cleveland ask the Commission to clarify that its deference to the determinations of the states is to the authority of the states as exercised through state legislative bodies (and other political subdivisions with legislative authority) as well as to state regulatory bodies. They submit that if the state legislature, or a local government acting in accordance with its authority, enacts retail wheeling legislation that expressly limits the ability of its regulatory

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703 *E.g.*, Central Illinois Light, IN Com, American Forest & Paper, IN Consumer Counselor, IN Consumers, IL Com. TX Com considers that it has the power to address stranded cost issues related to retail transmission service.

704 IL Com at p. 38 (emphasis in original).

body to permit recovery of stranded costs, even barring all such recovery, the Commission should not become involved.

Several entities ask the Commission to clarify that Order No. 888 does not permit utilities to apply to the Commission for recovery of stranded costs associated with a retail wheeling customer when a state regulatory authority has "addressed" a request for the same stranded costs but has not allowed 100 percent recovery.[705] ELCON gives two hypothetical examples to which it asks the Commission to respond: one where a state regulatory authority possesses full stranded cost recovery authority but allows only 50 percent recovery; the other where the state legislature provides the state regulatory authority by statute with the power to permit recovery of up to 50 percent of identified stranded costs.

Commission Conclusion

We reaffirm our conclusion that both this Commission and the states have the legal authority to address stranded costs that result when retail customers obtain retail wheeling in interstate commerce from public utilities in order to reach a different generation supplier, but that, because it is a state decision to permit or require the retail wheeling that causes retail stranded costs to occur, we will leave it to state regulatory authorities to deal with any stranded costs occasioned by retail wheeling. The only circumstance in which we will entertain requests to recover stranded costs caused by retail wheeling is when the state regulatory authority does not have authority under state law to address stranded costs when the retail wheeling is required.

We will reject the requests for rehearing that oppose any Commission involvement in stranded costs associated with retail wheeling customers. We disagree with those entities that challenge our conclusion that both this Commission and the states have the legal authority to address stranded costs

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[705] *E.g.*, ELCON, NASUCA, IL Com, NY Com.

that result from retail wheeling (variously described by those entities as dual, concurrent, or joint jurisdiction). The Commission explained in detail in Order No. 888 the legal basis for concluding that this Commission and the state commissions each have jurisdiction over separate aspects of a retail wheeling transaction.[706] This Commission has jurisdiction over the rates, terms, and conditions of unbundled retail transmission in interstate commerce by public utilities. State commissions have jurisdiction over local distribution facilities and the service of delivering electric energy to end-users. Based on our respective jurisdictions over separate aspects of the retail wheeling transaction, we believe either has the authority to provide the former supplying utility with an opportunity to recover costs stranded when the departing customer uses retail transmission in interstate commerce to reach a new supplier, but that here, unlike the retail-turned-wholesale scenario, the state commission should be the primary forum because these costs are stranded by the action of the state. We would act only if the primary forum is not available. We have made a policy decision that this Commission will step in to fill a regulatory "gap" that could result in no effective forum under which utilities would have an opportunity to seek recovery of prudently incurred costs.

Several entities argue that the Commission does not have jurisdiction over stranded investment in retail generating assets, that use of Commission-jurisdictional transmission does not change the character of the costs that are stranded, that stranded costs associated with retail wheeling customers are not costs of providing unbundled transmission service,

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[706] *See FERC Statutes and Regulations, Regulations Preambles January 1991-June 1996* at pp. 31,780-85; *mimeo* at pp. 427-42 and appendix G.

but are costs associated with providing what was formerly bundled retail service, and that only state regulators are in a position to rule on the treatment of costs that were allowed in retail rates pursuant to state laws. While we agree that stranded costs associated with retail wheeling are costs that are retail in character in the sense that they are in retail bundled rates and become stranded as a result of retail wheeling required by the state commission, we do not believe this precludes the Commission from exercising jurisdiction in the limited circumstances of the Rule.

As an initial matter, we note that there are rarely separate retail and wholesale generating facilities. Retail customers and wholesale requirements customers get energy from the same facilities, each buying a "slice of the system." Typically all generating assets go into both the retail and the wholesale rate bases for determining retail and wholesale rates. Rates are determined by allocating the total generating costs among customer classes. The parties confuse the issue before us to the extent they suggest that state commissions, not this Commission, have "jurisdiction" over certain "costs." Neither the state commissions nor this Commission has exclusive jurisdiction over "costs." Each regulatory authority has jurisdiction to determine "rates" for services subject to its jurisdiction and, in determining rates, may take into account all of the costs incurred by the utility. Under historical cost-of-service ratemaking, each regulatory authority, in exercising its respective *ratemaking* jurisdiction, reviews the *total* costs incurred by a utility to provide service and make its separate and independent determination of what costs may be recovered through rates within its jurisdiction.[707]

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[707] If a utility is regulated by both this Commission and a state commission, each commission, in setting cost-of-service rates within its jurisdiction, will separately and independently determine the utility's *total* cost of providing service (also known as the utility's total revenue requirement). This will be based on the expenses incurred in providing service and a reasonable profit on the utility's assets that are used to provide the service. The commissions may differ as to what assets are

Generating costs continually shift between retail and wholesale rates over time.[708]

More importantly, both the state commission and this Commission have a responsibility to oversee the financial health of the utilities we regulate. Each has jurisdiction to make judgments about recovery of the costs of the assets in the utility's total rate base. Utilities are entitled to a regulatory forum that can adjudicate claims that they are or are not entitled to recovery of costs incurred regardless of the initial retail or wholesale "character" of those costs, and we believe we have the authority and obligation to fill a regulatory "gap" that could occur.[709]

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appropriately included in total rate base, what other costs are appropriately included in the total cost of service, and what rate of return should be permitted. Once each regulatory authority has determined the appropriate total revenue requirement, it then will determine what portion of that total revenue requirement should be borne by the utility's wholesale customers and what share should be borne by retail customers (also-called cost allocation). Each commission may also reach different conclusions on this split as well. Thus, under historical cost-based ratemaking, regulatory authorities do not carve out so-called "wholesale costs" that only this Commission can take into account in determining rates subject to its jurisdiction or so-called "retail costs" that only a state commission can take into account in determining rates subject to state jurisdiction. Additionally, this Commission and state commissions have the discretion to determine whether costs are appropriately recovered through a transmission, generation, or distribution component of a rate (also-called functionalization of costs) within their respective jurisdictions.

[708] We reject arguments that stranded retail generation costs are not a cost of providing unbundled retail transmission. While such costs are not a cost of operating the physical transmission system, nevertheless, they are an economic cost incurred as a result of being required to provide retail transmission.

[709] This is not a regulatory "gap" in the sense that the Commission would be asserting authority over matters not within its jurisdiction. However, the Commission would be filling a regulatory "gap" to the extent that the utility normally would have the opportunity to seek

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In response to the argument that it is solely the action of the state that allows a retail customer to seek alternative sources of supply and, as a result, there is no nexus between the Commission's wholesale transmission rule and any costs that might be stranded by a state-established customer choice regime, we agree. Indeed, as we indicate in Order No. 888, we decided to leave it to state regulatory authorities to deal with any stranded costs occasioned by retail wheeling (with a limited exception) because it is a state decision to permit or require the retail wheeling in the first instance that causes retail stranded costs to occur. Our determination, as explained above, is to fill any regulatory gap that arises as a result of interstate wheeling. We believe that it is necessary for the Commission to act as a backstop in this limited instance to ensure that costs stranded as a result of retail wheeling do not go unrecovered because the state regulatory authority lacks the authority under state law to address such costs. At the same time, as we stated in Order No. 888, we believe that most states have a number of mechanisms for addressing stranded costs caused by retail wheeling. We emphasize that this rule is not intended to preempt the exercise of any existing state authority with respect to the assessment of a stranded cost or stranded benefits charge on a retail customer that obtains retail wheeling.

In response to arguments that the Commission's decision will result in second-guessing or interfering with a state's legislative processes and decisions, we believe these arguments are premature. As a general matter, we do not

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approval from its state regulatory commission to recover costs in retail rates from a departing retail customer or to reallocate those costs to other retail customers. In circumstances where the utility does not have this opportunity because the state regulatory authority has no authority to address the issue, we may appropriately fill this regulatory "gap" to permit recovery from the departing customer through the retail transmission rate.

expect that our decision to be a backstop will interfere with legislative decisions that specifically address stranded cost matters and the scope of the state regulatory authority's authority in determining stranded costs. If states or parties to a retail stranded cost recovery case brought before this Commission believe that a Commission decision on the issue would interfere with state legislative decisions, they should raise their arguments, and support therefor, at that time.

We clarify that Order No. 888 does not permit utilities to seek recovery from the Commission of stranded costs associated with retail wheeling customers if a state regulatory authority with authority to address retail wheeling stranded costs has in fact addressed such costs, regardless of whether the state regulatory authority has allowed full recovery, partial recovery, or no recovery.

Rehearing Requests Supporting Broader Jurisdiction Over Stranded Costs Associated With Retail Wheeling Customers

A number of entities seek rehearing of the Commission's decision not to serve as a backstop for all stranded costs associated with retail wheeling customers. Some assert that the Commission has the legal authority to address independently stranded costs that arise from retail wheeling and that the Commission cannot lawfully abdicate or delegate such authority to the states.[710] Coalition for Economic Competition submits that the Commission correctly concluded that it has jurisdiction over retail transmission rates, terms and conditions and the authority to address retail wheeling stranded costs. Thus, it argues that the Commission is without the power to make a "policy determination" that results in the Commission not exercising its legal authority over stranded costs associated with retail wheeling customers. It asserts that, just as the Commission recognizes

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[710] *E.g.*, Utilities For Improved Transition, Coalition for Economic Competition.

that it "cannot simply turn over its jurisdiction" to the states to determine facilities subject to Commission jurisdiction,[711] [711] the Commission cannot turn over its jurisdiction to establish stranded cost charges that it correctly determined it has the authority to establish. Coalition for Economic Competition argues that the Commission should adopt a stranded cost recovery policy similar to the policy the Commission has adopted with respect to the determination of state/federal jurisdiction, whereby the Commission would defer to state stranded cost determinations so long as they are consistent with the Commission's policy.

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Utilities For Improved Transition argues that the Commission's authority over public utility rates for the transmission of electric power, both wholesale and retail, is plenary and exclusive. As a result, it submits that the Commission may not avoid responsibility for costs stranded by transmission of retail power.[712] Illinois Power contends that Congress did not authorize the Commission to reject jurisdictional rate filings whenever the Commission regards the state commissions as a more convenient or appropriate forum.

EEI and the Coalition for Economic Competition contend that virtually all retail stranded costs can only occur through the vehicle of Commission-jurisdictional

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[711] *FERC Statutes and Regulations, Regulations Preambles January 1991-June 1996* at p. 31,784; *mimeo* at p. 439.

[712] Utilities For Improved Transition argues that, based on *Consolidated Edison Company of New York, Inc.*, 15 FERC ¶61,174, at p. 61,405 (1981) and other cases, the Commission has jurisdiction over the entire delivery service (rendered on both the transmission and local distribution facilities) as a transmission transaction. Utilities For Improved Transition submits that states do not have authority over rates on local distribution facilities used to complete a transmission transaction.

transmission in interstate commerce. They submit that the Commission, having recognized the clear nexus between FERC-jurisdictional transmission and stranded costs in the retail-turned-wholesale context, cannot fail to recognize the same clear nexus in the retail wheeling context.

Utilities For Improved Transition says that it is legally immaterial whether stranded costs are caused by the Commission's ordering the transmission or the states' doing so; the determining factor is who has the jurisdiction to make the rates for the service, not who has the jurisdiction to order the service.

Coalition for Economic Competition and Utilities For Improved Transition contend that the Commission must consider stranded costs that arise from retail wheeling in order to satisfy its statutory obligation under the FPA to "set just and reasonable" rates. Coalition for Economic Competition maintains that FPA sections 201, 205 and 206 do not give the Commission the flexibility to allow stranded costs in certain jurisdictional wheeling rates (*e.g.*, wholesale wheeling and new municipalizations) but to exclude them from other jurisdictional wheeling rates (*e.g.*, retail wheeling, municipal annexation, and bypass).[713] Utilities For Improved Transition says that the just and reasonable standard requires the Commission to backstop the states to ensure that there is full stranded cost recovery. It objects that Order No. 888's disposition of jurisdiction creates a problem of cross-class discrimination (wholesale versus retail) and inter-class discrimination (some retail versus the remainder of the retail).

Coalition for Economic Competition further argues that the Commission's failure to address all stranded costs associated with retail wheeling customers will result in an

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[713] EEI states that the Commission did not rebut EEI's argument that the Commission's failure to address all retail stranded costs was unduly discriminatory.

improper taking under the Constitution.[714] It also argues that the Commission is not permitted to disregard its findings in Order No. 888 which, according to Coalition for Economic Competition, "inexorably" lead to the conclusion that Commission action on "all" stranded costs (including retail wheeling, municipal annexation, and bypass stranded costs) is required.[715]

Illinois Power argues that the FPA does not authorize the Commission to discriminate among utilities based on the state of their residence, and that the Commission must allow all utilities to seek interstate rate recovery of just and reasonable retail stranded costs. Illinois Power asserts that the rule will lead to the absurd, unduly discriminatory result that utilities located in states whose legislatures have failed to provide for stranded cost recovery will be better off than those located in states that provide for only limited stranded cost recovery. It supports use of the Commission's statutory authority to establish a uniform, national method for retail stranded cost recovery.

Coalition for Economic Competition also contends that the Commission's decision

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to let the states deal with retail stranded costs is arbitrary and capricious because the Commission failed to consider the arguments that stranded cost opponents will make before state commissions, such as that a state lacks jurisdiction to impose stranded cost charges or that the state imposition of such charges may be preempted or found to be an undue burden on interstate commerce. It further argues that the

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[714] In support of its argument, Coalition for Economic Competition cites *Federal Power Commission v. Hope Natural Gas Company*, 320 U.S. 591, 602 (1944); *Duquesne Light Company v. Barasch*, 488 U.S 299, 307-08 (1989).

[715] Coalition for Economic Competition at p. 14.

Commission's reliance on state jurisdiction over the service of delivering electric energy to the end-user does not reflect reasoned decisionmaking. It submits that the Commission has failed to consider that the sale of electric energy may take place outside of the state into which the energy is transmitted, in which case the state commission may have no jurisdiction over either the sale or the transmission of the energy and, accordingly, no authority to consider stranded costs.

A number of entities ask the Commission to act on requests for retail stranded cost recovery when the state commission lacks authority *or* has authority to order recovery, but has declined to do so or has only allowed partial recovery.[716]

Lastly, TX Com notes that section 35.26(d) (dealing with recovery of retail stranded costs) refers only to public utilities. It suggests that the omission of a reference to transmitting utilities appears to be inadvertent and should be corrected.

Commission Conclusion

The Commission will reject the requests for rehearing of our decision not to assume a backstop role for all stranded costs associated with retail wheeling customers. We explained in Order No. 888 that commenters that describe our action as an unlawful abdication or delegation of authority misconstrue the nature of our decision to leave stranded costs associated with retail wheeling customers (with a limited exception) to state regulatory authorities.[717]

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716 *E.g.*, Centerior, Southern, SoCal Edison.

717 We also explained that the case law they cite (which they refer to again in their rehearing requests) to support the proposition that an agency is not authorized to abdicate its statutory responsibility or to delegate to parties and intervenors regulatory responsibilities is factually distinguishable and inapposite. *See FERC Statutes and Regulations,*

We have not "abdicated" or "delegated" to state regulatory authorities our jurisdiction over the rates, terms, and conditions of retail transmission in interstate commerce; if retail transmission in interstate commerce by a public utility occurs, public utilities offering such transmission must comply with the FPA by filing proposed rate schedules under section 205.[718] Instead, we have made a policy determination that the recovery of stranded costs associated with retail wheeling customers—an issue over which either this Commission or state commissions could exercise authority by virtue of their jurisdiction over retail transmission in interstate commerce and over local distribution facilities and services, respectively—is primarily a matter of local or state concern for which the primary forum should be the state commissions. However, if the state regulatory authority does not have authority under state law to be the forum to address stranded costs when the retail wheeling is required, then we will entertain requests to recover such costs. As we explain above in response to the rehearing petitioners that oppose any Commission involvement in stranded costs associated with retail wheeling customers, we have made a policy decision that this Commission will step in to fill a regulatory "gap"

Regulations Preambles January 1991-June 1996 at p. 31,825 and note 765; *mimeo* at pp. 554-55 and note 765.

[718] The entities who argue that the Commission has abdicated or delegated its jurisdiction to the states misconstrue the Commission's jurisdiction to determine rates for unbundled transmission in interstate commerce as somehow including exclusive "jurisdiction" over "costs." However, as discussed above, neither this Commission nor the state commissions has exclusive "jurisdiction" over "costs." Rather, each has jurisdiction to determine "rates" for services subject to its jurisdiction. It is in the course of determining "rates" for unbundled transmission in interstate commerce that this Commission can take into account various costs incurred by a utility to provide jurisdictional service. A state commission can take those same costs into account in making its separate and independent determinations of what costs may be recovered through rates within its jurisdiction. *See* note 707, *supra*, and accompanying text.

that could result in no effective forum under which utilities would have an opportunity

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to seek recovery of prudently incurred costs.[719]

We disagree with Coalition for Economic Competition's argument that our findings in Order No. 888 "inexorably" lead to the conclusion that Commission action on "all" stranded costs (including retail wheeling and bypass stranded costs) is required, much less that the Commission has ignored the findings in Order No. 888. To the contrary, as we explain in section IV.J.1, it is not the purpose of this rule to allow utilities an opportunity to seek to recover "all" uneconomic costs that might be stranded when a customer leaves its utility supplier. We have fully explained our reasons for adopting an approach that, for purposes of stranded cost recovery from wholesale transmission customers, relies on the nexus between stranded costs and the use of transmission tariffs required by this Commission and, for purposes of stranded cost recovery from retail customers, recognizes state commission jurisdiction but fills potential regulatory gaps that could arise in the transition to new market structures.

We disagree with those entities that contend that the Commission must consider retail stranded costs in order to satisfy our statutory obligation under the FPA to set just and reasonable rates. In determining just and reasonable rates for jurisdictional transmission service, which currently are determined on a cost basis, the Commission satisfies its statutory obligation under the FPA by allowing utilities an opportunity to recover their prudently incurred costs plus a

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[719] Based on these same considerations, we reject Coalition for Economic Competition's request that the Commission assume a backstop role for all stranded costs associated with retail wheeling customers but defer to state stranded cost determinations so long as they are consistent with the Commission's policy.

reasonable rate of return. As we have explained above, this may include the costs of use of the physical transmission system, as well as economic costs incurred by the utility when it provides transmission service (*e.g.*, stranded costs). However, in situations in which a state regulatory authority has the authority to address recovery of retail stranded costs, there is no regulatory "gap," and there is no obligation for this Commission to provide a second opportunity for recovery.[720]

We reject arguments that FPA sections 201, 205 and 206 do not give the Commission the flexibility to allow stranded costs in certain jurisdictional wheeling rates (wholesale wheeling and new municipalizations) but to exclude them from other jurisdictional wheeling rates (retail wheeling in interstate commerce and use of another utility's transmission tariff), and that this policy somehow makes rates discriminatory. Recovery of this type of cost through a transmission rate is obviously not the norm, but is necessitated by the need to deal with the transition costs associated with this Rule. As discussed in detail in the Rule, the Commission has carefully balanced the interests of utilities as well as customers in concluding that the opportunity for stranded cost recovery through transmission rates should be permitted in only two general circumstances: (1) in the case of wholesale stranded costs, where there is a direct nexus to Commission-required transmission access; and (2) in the case of retail stranded costs, where there otherwise would be a regulatory gap because a state regulatory authority lacks authority under state law to address stranded costs at the time that retail wheeling is required. We

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[720] If the state regulatory authority is the forum before which to seek recovery, the utility may make whatever arguments it wishes regarding the justness and reasonableness of its rates, as well as any unconstitutional taking arguments it may have, before the state forum. Further, it can pursue appeals of unfavorable decisions through the state court system.

see nothing in the FPA that precludes us from exercising this flexibility and, indeed, the parties have not pointed to anything that, in our opinion, precludes us from exercising this discretion.

We reject the argument that virtually all stranded costs associated with retail wheeling customers can occur only through the vehicle of Commission-jurisdictional transmission in interstate commerce, and therefore, that the same nexus between FERC-jurisdictional transmission and stranded costs that exists in the retail-turned-wholesale context is present in the retail wheeling context. We also

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disagree that it is legally immaterial whether stranded costs are caused by the Commission's ordering the transmission or the states doing so, and that the determining factor is who has the jurisdiction to make the rates for the service, not who has the jurisdiction to order the service. The opportunity for stranded cost recovery set forth in this rule is based on the causal link between stranded costs and the availability and use of the Commission-required transmission tariff. It is true that in both the retail-turned-wholesale context and the retail wheeling context there is a limited nexus between stranded costs and Commission-jurisdictional access since, in both situations, the Commission has jurisdiction over the rates, terms and conditions of the transmission service and, therefore, the authority to permit stranded cost recovery through the transmission rates. However, the *causal* nexus to FERC-jurisdictional transmission and stranded costs in the two contexts (retail vs. retail-turned-wholesale) is different. In the retail wheeling context, there is *no causal nexus* between stranded costs and transmission that has been *ordered by this Commission.* In the retail-turned-wholesale context, in contrast, the opportunity for a utility to seek recovery of stranded costs is grounded on the existence of a *direct causal nexus* between stranded costs and transmission that has been *ordered by this Commission.*

We will reject the rehearing petitions that ask the Commission to act on requests for stranded cost recovery associated with retail wheeling customers not only when the state commission lacks authority, but also when the state commission has authority but either has declined to use it or has only allowed partial recovery. As explained above, our decision to entertain requests to recover stranded costs caused by retail wheeling in a limited circumstance (when the state regulatory authority does not have authority under state law to address stranded costs when the retail wheeling is required) is based on our determination to fill any regulatory gap that arises in association with interstate transmission.

We will reject TX Com's request that the Commission clarify that section 35.26(d) (dealing with recovery of retail stranded costs), which refers only to public utilities, should also refer to transmitting utilities. The Commission's decision to act as a limited backstop in the case of stranded costs associated with retail wheeling customers is based on our jurisdiction under sections 205 and 206 of the FPA over the rates, terms, and conditions of retail transmission in interstate commerce. As a result, our ability to allow the recovery of such costs through a surcharge on a section 205 unbundled transmission rate is necessarily limited to public utilities.[721]

Rehearing Requests Opposing Commission Treatment of Stranded Costs Associated with Retail Wheeling Customers in Holding Company Intra-system Agreement Cases

A number of entities oppose the Commission's proposal to address on a case-by-case basis whether jurisdictional intra-system agreements may need to be amended in order to prevent inappropriate cost-shifting that could occur if one

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[721] We note that the definition of "retail stranded cost" in section 35.26(b)(5) mistakenly refers to "a public utility *or* transmitting utility" (emphasis added). We will revise the definition to remove the reference to "transmitting utility."

state disallows stranded cost recovery associated with retail wheeling customers. IN Com objects that the problem is not the actions of one state or another, but rather the terms of the intra-system agreement.

AR Com objects that Order No. 888 is factually in error because a state's treatment of retail stranded costs under the Entergy System Agreement cannot shift costs to other jurisdictions.[722] It submits that whenever retail load changes, whether due to retail wheeling or any other factor, responsibility ratios under Entergy's reserve equalization schedule, MSS-1, will change and costs will shift irrespective of the regulator's treatment of retail stranded costs. AR Com says that MSS-1 reveals no changes in calculations due to retail treatment of stranded costs or any other retail ratemaking; only

[30,420]

"excess" capacity costs of intermediate gas- and oil-fired plant are "shifted" under the Entergy System Agreement. Although the Commission has the authority to amend intra-system agreements when wholesale cost allocations have become unjust and unreasonable, AR Com submits that the Commission does not have jurisdiction to reach to the state level and dictate what retail ratepayers should pay to shareholders. AR Com maintains that a FERC-jurisdictional intra-system agreement extends only to sales for resale (transactions among subsidiaries), and that if a holding company believes that an intra-system agreement is unduly discriminatory as a result of a state's disallowance of costs, the holding company can propose to amend it.[723]

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[722] *See also* MO/KS Coms (the cost-shifting problem does not arise because of a particular state treatment of stranded costs; it arises because Entergy insists on recovering 100 percent of its costs even when some portion of the costs are not economical).

[723] AR Com also objects to the Commission's description of the issue as involving not only holding companies, but also other multi-state

AR Com argues that retail stranded costs fall to state jurisdiction regardless of whether the utility is a member of an interstate holding company. AR Com says that because the costs at issue are in retail rate base, any Commission influence over their recovery could occur only through preemption, but preemption of a state disallowance from retail rate base is possible only if there is a "trapped cost." AR Com submits that a disallowance of retail rate base cost cannot result in a trapped cost because there is no inconsistency between two agencies acting within their jurisdiction; the Commission has no jurisdiction to act. AR Com maintains that, unlike the Grand Gulf situation, the Commission has not mandated any Entergy generation costs into retail rate base. It further says that different state decisions regarding recovery of retail costs are not inconsistent decisions; they represent each state applying its law to its facts. According to AR Com, decisions by states leading to less than full recovery could be deemed inconsistent decisions only if there were a federal guarantee of full cost recovery of retail costs, which there is not.

AR Com and MO/KS Coms assert that the Commission's proposal for holding company situations cannot apply to future holding companies, where there is no history of joint planning justifying cost equalization, nor can it apply to future investments. They contend that this would require an assumption that the utility subsidiaries of a registered holding company have planned, and should plan, together rather than separately (i.e., that interaffiliate transactions are always more efficient than nonaffiliate transactions), and that such assumption would be sound only

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situations. AR Com says that "[t]he mere fact that a company's territory crosses state lines does not automatically mean that all assets serve all customers, or that all customers are required to bear the economic risk associated with all assets, or that assets that at one time were solely state-jurisdictional can somehow, by virtue of a company's decision to expand across state lines, become FERC-jurisdictional." AR Com at p. 11.

if having the transaction occur between affiliates is inherently more efficient than having the transaction occur between an affiliate and a nonaffiliate.

Commission Conclusion

The comments raised for the most part are either premature or reflect a misunderstanding of the Commission's decision. Contrary to AR Com's argument, the Commission in Order No. 888 in no way asserted jurisdiction over state determinations of stranded costs associated with retail wheeling customers. We agree with AR Com that our jurisdiction extends only to sales for resale (and transmission in interstate commerce) and that a holding company can seek to amend an intra-system agreement if it believes the agreement is unduly discriminatory as a result of a state's disallowance of costs. However, a holding company also may seek to amend an agreement *before* any potential disallowances can occur, to keep cost-shifting from occurring. The fact is that intra-system agreements which involve wholesale sales among affiliate companies in different states could, through operation of their reserve equalization formulas, result in customers in one or more states having to indirectly bear stranded costs that are disallowed in another state, and the Commission has a responsibility to prevent inappropriate cost-shifting. Such determinations can be made only on a case-by-case basis. Again, as we stated in Order No. 888, we encourage affected state commissions to propose mutually agreeable solutions to this potential problem.

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8. Evidentiary Demonstration Necessary—Reasonable Expectation Standard

In Order No. 888, the Commission concluded that a utility seeking to recover stranded costs must demonstrate that it had a reasonable expectation of continuing to serve a customer. We stated that whether a utility had a reasonable

expectation of continuing to serve a customer, and for how long, will be determined on a case-by-case basis, and will depend on all of the facts and circumstances. We also determined that the existence of a notice provision in a contract would create a rebuttable presumption that the utility had no reasonable expectation of serving the customer beyond the specified period. We said that whether or not a contract contains an "evergreen" or other automatic renewal provision will be a factor to be considered in determining whether the presumption of no reasonable expectation is rebutted in a particular case.[724]

We also said that we would apply the reasonable expectation standard to retail-turned-wholesale customers. We explained that, before the Commission will permit a utility to recover stranded costs, the utility must demonstrate that it incurred such costs based on a reasonable expectation that the retail-turned-wholesale customer would continue to receive bundled retail service. Whether the state law awards exclusive service territories and imposes a mandatory obligation to serve would be among the factors to be considered in determining whether the reasonable expectation test is met in a particular case.[725]

We noted that Order No. 888 does not address who will bear the stranded costs caused by a departing generation customer if the Commission finds that the utility had no reasonable expectation of continuing to serve that customer. We indicated that we anticipate that, in such a case, a public utility will seek in subsequent requirements rate cases to have the costs reallocated among the remaining customers on its

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[724] *FERC Statutes and Regulations, Regulations Preambles January 1991-June 1996* at p. 31,831; *mimeo* at pp. 570-72.

[725] *FERC Statutes and Regulations, Regulations Preambles January 1991-June 1996* at p. 31,831; *mimeo* at p. 572. We indicated that the same procedures would apply to retail customers that obtain retail wheeling.

system. However, we stated that we were not prejudging that issue in the Rule.[726]

Rehearing Requests Opposing or Seeking Modification of the Reasonable Expectation Standard

APPA challenges the reasonable expectation standard as being too vague. It submits that the Commission has provided no guidance concerning application of the reasonable expectation standard, other than to state that it would decide the issue on a case-by-case basis. APPA objects that public utilities can exploit the uncertainty created by this standard, which will lead to costly and time-consuming litigation. IL Com supports replacing the reasonable expectation standard with a statutory, regulatory, contractual standard.

Several entities contend that there is no basis to conclude that the reasonable expectation test could ever be met. VT DPS and Valero submit that, since 1973, utilities have known that a refusal to wheel power could subject them to antitrust liability. They say that Order No. 888 ignores the breadth of NRC licensing conditions. LEPA similarly argues that the reasonable expectation standard could not be met where NRC license conditions required an explicit wheeling commitment and prohibited the utility from including in the wheeling cost any amount attributable to the loss of customers due to the wheeling. It objects that delaying a decision on stranded cost recovery in such cases holds the threat of possible stranded cost charges over the heads of bulk power purchasers and thereby chills their ability to seek competitive sellers.

TAPS asserts that there should be an irrefutable presumption that no stranded costs are due from customers with pre-existing transmission rights, including customers

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[726] *FERC Statutes and Regulations, Regulations Preambles January 1991-June 1996* at p. 31,831; *mimeo* at pp. 572-73.

who were the beneficiaries of NRC license conditions.[727] TAPS submits that there can be no legitimate "reasonable expectation" that such customers

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would continue to purchase power if the price was higher than the market price.

Occidental Chemical asks the Commission to clarify that a utility could have had no reasonable expectation of recovering stranded costs from customers who, prior to the issuance of the NOPR, had the opportunity to switch to an alternative electric supplier or had the option of self-generating, obtaining on-site third-party generation, or municipalizing. Occidental Chemical further argues that it defies commercial expectations to allow a utility to argue that if a contract is silent on the issue of renewal, the obligation to purchase does not expire with the termination of the contract. It submits that the Commission has not shown that it has the authority to force customers to extend purchase agreements against their will in violation of accepted commercial practice.

A number of entities submit that the Commission erred in failing to treat a notice of termination provision as conclusive evidence that the utility had no reasonable expectation of continued service.[728] Several object that the Commission has failed to explain why the presence of a notice provision does not conclusively demonstrate the lack of a reasonable expectation and *ipso facto* terminate the

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[727] AMP-Ohio submits that where transmission access and competition have existed to varying extents for decades, there should be an irrebuttable presumption of no reasonable expectation of continued service.

[728] *E.g.*, APPA, American Forest & Paper, Central Montana EC, NRECA, TDU Systems, Oglethorpe, IMPA, VT DPS, Valero, PA Munis.

obligation of the customer to purchase the product.[729] APPA objects that the Commission provided no evidence that it considered comments supporting making the presumption conclusive and that it found legally sufficient reasons to reject them.

PA Munis objects that the rebuttable presumption represents an unjustified departure from the Commission's traditional policy of enforcing the express terms of notice provisions without any inquiry into the reasonable expectations of the party, provided that the agreements were negotiated in good faith and approved by the Commission.[730] PA Munis contends that wholesale requirements customers negotiated notice provisions with the knowledge that the Commission would enforce the notice provisions according to their terms, including the specific length of the term.[731] PA Munis argues that it is arbitrary and capricious to provide utilities an opportunity to seek to amend these contracts.

Several entities submit that the rebuttable presumption invites litigation and promotes uncertainty for customers.[732] APPA objects that the Commission has failed to establish the showing that it would require to overcome the presumption.

Referring to the Commission's discussion of evergreen provisions, Central Montana EC argues that it is wrong to infer from the existence of an automatic renewal provision that the parties intended that the contract might run longer

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729 *E.g.*, APPA, NRECA, TDU Systems. *See also* VT DPS and Valero (by signing a contract with a termination date, the utility assumed the risk that the customer will elect to leave when the contract expires).

730 In support of its argument, PA Munis cites *Boston Edison Company*, 56 FPC 3414 (1976). *See also* American Forest & Paper.

731 *Citing Kentucky Utilities Company*, 23 FERC ¶61,317 (1983); *Philadelphia Electric Company and Susquehanna Electric Company*, 65 FERC ¶61,303 (1993).

732 *E.g.*, NRECA, IMPA, PA Munis.

than its initial term. Central Montana EC asserts that the presence of an evergreen provision infers simply that the parties agreed upon a mechanism to avoid the renegotiation of a power supply contract if, at the conclusion of its initial term, the parties were satisfied with the contract. It maintains that the parties' obligations are defined by the term and termination provisions of wholesale power contracts, and that the presence of a mechanism to avoid contract renegotiation does not alter those termination rights.

Commission Conclusion

We will reject the requests for rehearing of our decision to adopt a reasonable expectation standard to be applied on a case-by-case basis and to treat a notice provision in a contract as a rebuttable, not a conclusive, presumption of no reasonable expectation. Contrary to the claims of some entities, the Commission has explained the basis for its finding that utilities may have had an implicit obligation to serve their wholesale requirements customers and, therefore, that a utility should be given an opportunity to demonstrate that it incurred costs to provide

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service to a customer and that it had a reasonable expectation that it would continue to serve the customer beyond the contract termination date. The same factors that some petitioners contend establish the absence of a reasonable expectation of continued service may be offered as evidence to be considered in determining whether the reasonable expectation test is met in a particular case.

We believe that our decision to treat a notice of termination provision in a contract as creating a rebuttable presumption that the utility had no reasonable expectation of serving the customer beyond the period provided for in the notice provision is a reasonable one. It places evidentiary significance on the fact that a contract contains a notice of termination provision. Moreover, while it gives the utility an

opportunity, based on the facts and circumstances of a particular case, to rebut the presumption of no reasonable expectation, it firmly places the burden of establishing reasonable expectation on the utility. Although some entities support treating notice provisions as a conclusive presumption of no reasonable expectation, as discussed below, we decline to adopt such an inflexible approach. Nevertheless, as we indicated in Order No. 888, when a utility is seeking a contract amendment to permit stranded cost recovery based on expectations beyond the stated term of the contract, we believe that the utility has a heavy burden in demonstrating that the contract ought to be modified.[733]

Contrary to the position of PA Munis, the rebuttable presumption is fully consistent with the Commission's past treatment of notice provisions. For example, the *Kentucky Utilities Company* case cited by PA Munis supports the proposition that, until a customer *exercises* a notice of termination provision, the utility is under an implicit obligation to continue to serve and plan for the future needs of the customer.[734] Thus, the presence of a notice of termination provision in a contract (particularly one not yet exercised by the customer), in and of itself, may not necessarily support the conclusion that the utility could never prove that it reasonably expected to continue serving the customer beyond the notice period.[735]

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[733] *FERC Statutes and Regulations, Regulations Preambles January 1991-June 1996* at pp. 31,665, 31,813-14; *mimeo* at p. 87, 522.

[734] *See Kentucky Utilities Company*, 23 FERC at pp. 61,679-80 ("Once it receives an effective notice of cancellation, Kentucky can stop planning for the future needs of that customer. . . . To be effective a notice of cancellation must contain a specification of the source of supply, the date on which the source of supply will be available, and an affidavit from the supplier that it will supply the customer on the date the contract ends.").

[735] *See Potomac Electric Power Company*, 43 FERC ¶61,189 (1988) (suspending a notice of termination for five months due to questions about the impact of the proposed cancellation on service reliability).

In response to APPA's objection that the Commission has failed to establish the showing that it would require to overcome the presumption, we note that the Commission cannot establish such a showing upfront because whether there is sufficient evidence to rebut the presumption of no reasonable expectation will depend on the facts of each case.

We appreciate the concerns expressed by some entities that the rebuttable presumption may increase the customer's uncertainty by inviting litigation. We have carefully weighed the pros and cons of treating a notice provision as a rebuttable presumption of no reasonable expectation versus the pros and cons of treating it as a conclusive presumption of no reasonable expectation. It is true, as some entities assert, that the rebuttable presumption approach presents the potential for litigation between the parties as to whether, in a particular case, the utility can rebut the presumption. The alternative would be to treat all contracts with notice of termination provisions as conclusive evidence that the utility could have had no reasonable expectation that it would continue to serve the customer beyond the specified notice period. While the latter approach presumably would reduce the number of cases in which the issue of a utility's reasonable expectation would have to be litigated, it would do so only by prohibiting a utility from ever demonstrating that, notwithstanding the existence of a notice provision, based on the facts of a particular case, the utility reasonably expected to continue serving the customer. While we do not prejudge the likelihood of a utility being able to rebut the presumption in a particular case, we believe that

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it would not be in the public interest for the Commission to absolutely preclude a utility from being able to make such a showing. On this basis, we conclude that treating a notice provision as a rebuttable, rather than a conclusive, presumption that the utility did not have a reasonable

expectation of continuing service to the customer is, on balance, the fairer and more equitable approach.

Central Montana EC asserts that it is wrong to infer from the existence of an automatic renewal provision that the parties intended that the contract might run longer than its initial term. However, our statement in Order No. 888 that the existence of an automatic renewal provision will be a factor to be considered in determining whether the presumption of no reasonable expectation is rebutted in a particular case makes no such inference. Whether the utility can rebut the presumption will depend on the facts of each case.

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APPENDIX F

***Promoting Wholesale Competition Through Open Access Non-Discriminatory Transmission Services by Public Utilities; Recovery of Stranded Costs by Public Utilities and Transmitting Utilities, Notice of Proposed Rulemaking and Supplemental Notice of Proposed Rulemaking*, Notice of Proposed Rulemaking, [1988-1998 Proposed Regs.] F.E.R.C. Stats. & Regs. ¶ 32,514 (1995) (pertinent portion)**

APPENDIX F

[33,047]

[¶32,514]

60 F.R. 17662 (April 7, 1995)

18 CFR Part 385

[Docket Nos. RM95-8-000 and RM94-7-001]

Promoting Wholesale Competition Through Open Access Non-discriminatory Transmission Services by Public Utilities; Recovery of Stranded Costs by Public Utilities and Transmitting Utilities; Notice of Proposed Rulemaking and Supplemental Notice of Proposed Rulemaking

Issued March 29, 1995

AGENCY: Federal Energy Regulatory Commission.

ACTION: Notice of proposed rulemaking and supplemental notice of proposed rulemaking.

SUMMARY: The Federal Energy Regulatory Commission (Commission) is proposing to require that public utilities owning and/or controlling facilities used for the transmission of electric energy in interstate commerce have on file tariffs providing for nondiscriminatory open-access transmission services. The Commission is also proposing to permit public utilities and transmitting utilities to recover legitimate and verifiable stranded costs. The Commission's goal is to encourage lower electricity rates by structuring an orderly transition to competitive bulk power markets. The Commission is seeking public comment on its proposals.

DATES: Written comments must be received by the Commission by August 7, 1995. Reply comments must be received by the Commission by October 4, 1995.

FOR FURTHER INFORMATION CONTACT: David D. Withnell, Office of the General Counsel, Federal Energy Regulatory Commission, 825 North Capitol St., NE., Washington, DC 20426, telephone (202) 208-2063, (Docket No. RM95-8-000—legal issues).

Deborah B. Leahy, Office of the General Counsel, Federal Energy Regulatory Commission, 825 North Capitol St., NE., Washington, DC 20426, telephone (202) 208-2039, (Docket No. RM94-7-001—legal issues).

Michael A. Coleman, Office of Electric Power Regulation, Federal Energy Regulatory Commission, 825 North Capitol St., NE., Washington, DC 20426, telephone (202) 208-1236, (technical issues).

ADDRESSES: Send comments to: Office of the Secretary, Federal Energy Regulatory Commission, 825 North Capitol St., NE., Washington, DC 20426.

SUPPLEMENTARY INFORMATION: In addition to publishing the full text of this document in the *Federal Register*, the Commission also provides all interested persons an opportunity to inspect or copy the contents of this document during normal business hours in Room 3401, at 941 North Capitol St., NE., Washington, DC 20426.

The Commission Issuance Posting System (CIPS), an electronic bulletin board service, provides access to the texts of formal documents issued by the Commission. CIPS is available at no charge to the user and may be accessed using a personal computer with a modem by dialing (202) 208-1397. To access CIPS, set your communications software to 19200, 14400, 12000, 9600, 7200, 4800, 2400, 1200 or 300 bps, full duplex, no parity, 8 data bits and 1 stop bit. The full text of this document will be available on CIPS for 60 days from the date of issuance in ASCII and WordPerfect 5.1 format. After 60 days the document will be archived, but still accessible. The complete text on diskette in WordPerfect format may also be purchased from the

Commission's copy contractor, LaDorn Systems Corporation, also located in room 3104, 941 North Capitol Street, NE., Washington, DC 20426.

Promoting Wholesale Competition Through Open Access Non-discriminatory Transmission Services by Public Utilities

Docket No. RM95-8-000

Recovery of Stranded Costs by Public Utilities and Transmitting Utilities

[33,048]

RM94-7-001

Notice of Proposed Rulemaking and Supplemental Notice of Proposed Rulemaking

March 29, 1995

Table of Contents

I. Introduction

II. Public Reporting Burden

III. Discussion

A. Summary of Authority and Findings

B. Legal Authority

1. Undue Discrimination/Anticompetitive Effects

2. Section 211 Services

C. Background

1. Structure of the Electric Industry at Enactment of Federal Power Act

2. Significant Changes in the Electric Industry

3. The Public Utility Regulatory Policies Act and the Growth of Competition

4. The Energy Policy Act

5. The Present Competitive Environment

a. Use of Sections 211 and 212 to Obtain Transmission Access

b. Commission's Comparability Standard

c. Lack of Market Power in New Generation

d. Further Commission Action Addressing a More Competitive Electric Industry

D. Need for Reform

1. Market Power

2. Discriminatory Access

3. Analogies to the Natural Gas Industry

4. Coordination Rates

E. The Proposed Regulations

1. Non-discriminatory Open Access Tariff Requirement

2. Implementing Non-discriminatory Open Access: Functional Unbundling

3. Real-time Information Networks

4. Non-discriminatory Open Access Tariff Provisions

5. *Pro Forma* Tariffs

6. Broader Use of Section 211

7. Status of Existing Contracts

8. Effect of Proposed Rule on Commission's Criteria for Market-based Rates

9. Effect of Proposed Rule on Regional Transmission Groups

F. Stranded Costs and Other Transition Costs

G. Transmission/Local Distribution

H. Implementation

IV. Regulatory Flexibility Act

V. Environmental Statement

VI. Information Collection Statement

VII. Public Comment Procedures

Regulatory Text

Appendices

A. Electric Utility Average Revenue Per Kilowatthour, by State

B. Point-to-Point Tariff

C. Network Tariff

D. List of Commenters in Docket No. RM94-7-000

I. Introduction

The electric power industry is today an industry in transition. In response to changes in the law, technology, and markets, competitive pressures are steadily building in the industry. Once the primary domain of large, vertically integrated utilities providing power at regulated rates, the industry now includes companies selling "unbundled" power at rates set by competitive markets. New generating facilities are being built at costs well below the average costs of some vertically integrated utilities. In this environment, more competition will mean lower rates for wholesale customers and, ultimately, for consumers.

The Commission's goal is to encourage lower electricity rates by structuring an orderly transition to competitive bulk power markets. Development of such markets is certain. The questions are when and how. Experience has shown that competitive pressures cannot be contained for long without serious economic distortions. Competition will, we are

confident, result in lower rates. But experience has also shown that a measured

[33,049]

transition from regulated to competitive markets is absolutely essential.

Moving to competitive generation markets will fundamentally change long-standing regulatory relationships. Utilities have invested billions of dollars in order to meet their obligations. Those investments have been made under a "regulatory compact" whereby utilities—and their shareholders—expect to recover prudently incurred costs. With the advent of competition, even prudent investments may become stranded. Reliance on past contractual and regulatory practices must be recognized and past investments must be protected to assure an orderly, fair transition to competition.

The focus of our proposal today is to facilitate competitive wholesale electric power markets. The key to competitive bulk power markets is opening up transmission services. Transmission is the vital link between sellers and buyers. To achieve the benefits of robust, competitive bulk power markets, all wholesale buyers and sellers must have equal access to the transmission grid. Otherwise, efficient trades cannot take place and ratepayers will bear unnecessary costs. Thus, market power through control of transmission is the single greatest impediment to competition. Unquestionably, this market power is still being used today, or can be used, discriminatorily to block competition.

The Commission has an obligation to prevent unduly discriminatory practices in transmission access. In current circumstances, the absence of tariffs offering open access, non-discriminatory transmission services by each public utility impedes the transition to competitive markets greatly enough to be unduly discriminatory under section 206 of the Federal Power Act (FPA). Proceeding as we have in the

past, case-by-case, would delay unreasonably the transition to competitive markets. A patchwork of transmission systems—some open and some not—would also lead to unfair practices and inequitable burdens.

At the same time, while fulfilling our duty under section 206 of the FPA to cure undue discrimination, we see no need now to abrogate existing contractual relationships. Rather, we propose to provide a transition to a competitive generation industry that allows for the recovery of legitimate, prudent and verifiable costs lawfully incurred to serve customers under the terms of existing contracts. In the context of today's electric industry, the goals of increased competition and lower bulk power rates are best pursued through a structured transition rather than through abrogating all existing contracts.

In short, at this crossroad for the industry, it is critical to take the regulatory steps now to facilitate the transition to competitive bulk power markets in an orderly manner. The most important of these steps are to ensure non-discriminatory access to the transmission grid for all wholesale buyers and sellers of electric energy in interstate commerce, and to address the transition costs associated with open transmission access. The Commission will take these steps in a manner consistent with maintaining the reliability of the interstate transmission grid.

In this proceeding, the Commission pursuant to its authority under sections 205 and 206:

- proposes to require all public utilities owning or controlling facilities used for transmitting electric energy in interstate commerce to file open access transmission tariffs;

- proposes to require the utilities to take transmission service (including ancillary services) for their own wholesale sales and purchases of electric energy under the open access tariffs;

- issues a supplemental proposed rule to permit the recovery of legitimate and verifiable stranded costs associated with requiring open access tariffs; and

- proposes regulations to implement the filing of the open access tariffs and the initial rates under these tariffs.

The open access tariffs—to be offered to all sellers and buyers of electric energy sold at wholesale in interstate commerce—must offer wholesale transmission services (network and point-to-point), including ancillary services, on a nondiscriminatory

[33,050]

basis to third parties.[1] In addition, the public utility must price separately all wholesale generation and transmission services (including ancillary services) and take wholesale transmission service under its own tariff, *i.e.*, "functionally unbundle" its wholesale generation and transmission services. The proposed rule does not mandate the corporate separation of generation, transmission, and distribution functions.

The proposed rule proposes *pro forma* tariffs for network and point-to-point services, defines non-discriminatory open access to include access to ancillary services, and requires that tariffs include a reciprocity provision requiring any user or agent of the user of the tariff that owns and/or controls transmission facilities to provide non-discriminatory access to the tariff provider.

To assure that the open access tariffs promote competition and do not operate in an unduly discriminatory manner, the proposed rule would require public utilities to provide all actual or potential transmission users the same access to

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[1] Throughout this NOPR this requirement will be referred to as the "non-discriminatory open access" requirement.

information as the public utility enjoys. The Commission is proposing to develop industry-wide real-time information networks in a separate Notice of Technical Conference that is being issued concurrently with this proposed rule.[2]

Not all transmitting utilities are public utilities subject to the Commission's jurisdiction under section 206 of the FPA.[3] The Commission cannot pursuant to section 206 require non-public utilities to file open access tariffs. Therefore, the proposed rule would encourage the broad application of section 211 as an additional means of achieving the goal in the Energy Policy Act of 1992 of promoting increased wholesale competition. Without broader application of section 211, wholesale bulk power market participants could be denied access to more competitive generation sources to the detriment of consumers.

We presently do not find it necessary to use our authority under section 206 of the FPA to reform public utilities' existing requirements contracts or any other contracts to eliminate undue discrimination or attain more competitive bulk power markets. However, we seek information about existing requirements contracts, including the remaining life

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2 Notice of Technical Conference and Request for Comments, Docket No. RM95-9-000.

3 Section 206 of the FPA applies to public utilities, whereas section 211 applies to transmitting utilities. A public utility is defined under section 201(e) of the FPA as "any person who owns or operates facilities subject to the jurisdiction of the Commission under this Part (other than facilities subject to such jurisdiction solely by reason of sections 210, 211, or 212)." A transmitting utility is defined under section 323 of the FPA as "any electric utility, qualifying cogeneration facility, qualifying small power production facility, or Federal power marketing agency which owns or operates electric power transmission facilities which are used for the sale of electric energy at wholesale." Not all transmitting utilities are public utilities. For instance, a municipally-owned electric utility that owns transmission facilities that are used for the sale of electric energy at wholesale is a transmitting utility, but is not a public utility.

and notice provision in each such contract, and whether it would be in the public interest to modify any existing contracts.

The Commission believes that the open access requirement will eliminate the transmission market power of public utilities by ensuring that all participants in wholesale power markets will have non-discriminatory open access to the transmission systems of public utilities. This market power has been the Commission's primary concern in recent years in analyzing requests for market-based generation rates. We therefore seek comments on the effect of industry-wide non-discriminatory open access on the Commission's criteria for authorizing power sales at market-based rates.

The Commission's market-rate criteria also have included other aspects of market power, such as generation dominance. In particular, we note the Commission's recent *KCP&L* decision, in which we dropped the generation dominance standard for market-based sales from *new* capacity.[4] This rule proposes to codify that decision, and seeks comment on whether the generation dominance standard should also be dropped for market-based sales from *existing* capacity.

[33,051]

In issuing this proposed rule, we are particularly concerned with its possible effect on stranded costs. It is important to couple our open access rule with a rule ensuring recovery of all legitimate transition costs, consistent with the guidelines established herein. Accordingly, we are making preliminary findings with respect to the Stranded Cost NOPR issued on June 29, 1994, seeking additional comments, and

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[4] *See Kansas City Power & Light Company*, 67 FERC ¶61,183 at p. 61,557 (1994) (*KCP&L*).

consolidating the Stranded Cost NOPR[5] with this proposed rule.

Because of the benefits associated with the transition to a competitive regime, it is important to have the open access tariffs in place as soon as possible. Thus, we propose a two-stage procedure to accomplish that goal. In Stage One, we would place generic open access tariffs in effect simultaneously on a date certain for every public utility that owns and/or controls transmission facilities[6] and would establish rates for each public utility based on the most current Form No. 1 data available. In Stage Two, utilities would be free to propose changes to the rates, terms, and conditions in the generic tariffs and customers and others would be free to file complaints seeking changes in the rates, terms, and conditions. However, Stage Two tariffs must contain at least the non-price tariff terms and conditions contained in the *pro forma* tariffs. Comments of all interested persons should be filed pursuant to the procedures set out below.

II. Public Reporting Burden

A. *Docket No. RM95-8-000*

The proposed rule specifies filing requirements to be followed by public utilities in making non-discriminatory open access tariff filings. The information collection requirements of the proposed rule are attributable to FERC-516 "Electric Rate Filings." The current total annual reporting burden for FERC-516 is 784,488 hours.

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5 *See Recovery of Stranded Costs by Public Utilities and Transmitting Utilities, Notice of Proposed Rulemaking*, 59 FR 35274 (July 11, 1994), *FERC Statutes and Regulations, Proposed Regulations* ¶32,507 (Stranded Costs NOPR).

6 Because power pools raise complex issues, we seek comments on how to implement the NOPR for power pools.

The proposed rule requires public utilities filing non-discriminatory open access tariffs to provide certain information to the Commission. The public reporting burden for the information collection requirements contained in the proposed rule is estimated to average 300 hours per response. This estimate includes time for reviewing the requirements of the Commission's regulations, searching existing data sources, gathering and maintaining the necessary data, completing and reviewing the collection of information, and filing the required information.

There are approximately 328 public utilities, including marketers and wholesale generation entities. The Commission estimates that approximately 137 of these utilities own or control facilities used for the transmission of electric energy in interstate commerce and will respond to the information collection. The respondents would be all public utilities required to file non-discriminatory open access tariffs. These are the public utilities that are also transmitting utilities and either file Form 715 or have it filed on their behalf. The information will be provided with each filing by a respondent. Accordingly, the public reporting burden is estimated to be 41,100 hours.

Send comments regarding this burden estimate or any other aspect of the Commission's collection of information, including suggestions for reducing this burden, to the Federal Energy Regulatory Commission, 941 North Capitol Street, N.E., Washington, DC 20426 [Attention: Michael Miller, Information Services Division, (202) 208-1415], and to the Office of Information and Regulatory Affairs of the Office of Management and Budget [Attention: Desk Officer for Federal Energy Regulatory Commission (202) 395-3087].

B. Docket No. RM94-7-001

The initially proposed rule would require public utilities seeking to recover stranded costs to provide certain information to the Commission. The Commission estimated

that the public reporting burden for the information collection requirements contained in the initially proposed rule would be 50 hours per response. The Commission also estimated that there

[33,052]

would be ten respondents to the information collection annually.

Under the proposed rule contained in this supplemental notice of proposed rulemaking, the information that public utilities will be required to file is not substantially different from that required by the initially proposed rule. The Commission also believes that the average filing burden and frequency of filing will be approximately the same as under the initially proposed rule. Therefore, the Commission estimates that there will be no additional public filing burden associated with the proposed rule.

Send comments regarding this burden estimate or any other aspect of the Commission's collection of information, including suggestions for reducing this burden, to the Federal Energy Regulatory Commission, 941 North Capitol Street, N.E., Washington, DC 20426 [Attention: Michael Miller, Information Services Division, (202) 208-1415], and to the Office of Information and Regulatory Affairs of the Office of Management and Budget [Attention: Desk Officer for Federal Energy Regulatory Commission (202) 395-3087].

III. Discussion

A. *Summary of Authority and Findings*

The primary purposes of the Federal Power Act are to curb abusive practices by public utility companies and to protect consumers from excessive rates and charges. To achieve these ends, section 205 of the FPA requires that no public utility shall "make or grant any undue preference or advantage to any person or subject any person to any undue preference or disadvantage," with respect to the transmission

of electric energy in interstate commerce or the sale for resale of electric energy in interstate commerce.[7] Section 206 of the FPA authorizes the Commission to investigate and remedy unduly discriminatory or preferential rules, regulations, practices or contracts affecting public utility rates for transmission in interstate commerce or for sales for resale in interstate commerce.

The significant technological, structural, statutory, and regulatory changes over the past twenty years have affected the electric utility industry such that competitive bulk power markets are now emerging. This transition has expanded what the Commission must consider to be undue discrimination in the rates, terms, and conditions offered by public utilities. We find that utilities owning or controlling transmission facilities possess substantial market power; that, as profit maximizing firms, they have and will continue to exercise that market power in order to maintain and increase market share, and will thus deny their wholesale customers access to competitively priced electric generation; and that these unduly discriminatory practices will deny consumers the substantial benefits of lower electricity prices. We propose to prevent this discrimination by requiring all public utilities owning and/or controlling transmission facilities to offer non-discriminatory open access transmission services.

At the same time, we see no need now to abrogate existing contractual relationships. Instead, contracts should be permitted to run their course. Additionally, we believe that recovery of legitimate stranded costs is critical to the successful transition of the electric utility industry from a tightly regulated, cost-of-service utility industry to an open access, competitively priced power industry.

The requirement of open access coupled with the recovery of legitimate stranded costs furthers the

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[7] 16 U.S.C. §§ 824d(b) and 824(d).

Congressional purposes embodied in the Federal Power Act and the Energy Policy Act of 1992 of protecting consumers, ensuring reasonable rates, and encouraging competition.

Below, we set out the Commission's legal authority to require non-discriminatory open access, the relevant historical developments in the electric industry, and the need for regulatory reform.[8]

[33,053]

B. *Legal Authority*

1. Undue Discrimination/Anticompetitive Effects

The Commission has authority to remedy undue discrimination. That is clear. Some may argue that case law under the FPA limits our authority to order wheeling. We have carefully analyzed relevant cases examining our wheeling authority. We conclude that we have authority to require wheeling, or non-discriminatory open access, as a remedy for undue discrimination. Our analysis of the case law is set forth below.

In upholding the Commission's order requiring non-discriminatory open access in the natural gas industry, the court in *Associated Gas Distributors v. FERC* stated that the Natural Gas Act "fairly bristles" with concern for undue discrimination.[9] The same is true of the FPA. The Commission has a mandate under sections 205 and 206 of the FPA to ensure that, with respect to any transmission in interstate commerce or any sale of electric energy for resale

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[8] On February 16, 1995, the Coalition for a Competitive Electric Market filed a petition for a rulemaking on comparability. The Industrial Consumers and the Transmission Access Policy Study Group filed comments in support of the petition. The Commission will not separately notice the Coalition's petition, but seeks comment on that pleading, and the supporting pleadings, in this notice of proposed rulemaking.

[9] *Associated Gas Distributors v. FERC*, 824 F.2d 981, 998 (D.C. Cir. 1987), *cert. denied*, 485 U.S. 1006 (1988) (*AGD*).

in interstate commerce by a public utility, no person is subject to any undue prejudice or disadvantage. We must determine whether any rule, regulation, practice or contract affecting rates for such transmission or sale for resale is unduly discriminatory or preferential, and must prevent those contracts and practices that do not meet this standard. As discussed below, *AGD* demonstrates that our remedial power is very broad and includes the ability to order industry-wide non-discriminatory open access as a remedy for undue discrimination. Moreover, the Commission's power under the FPA "clearly carries with it the responsibility to consider, in appropriate circumstances, the anticompetitive effects of regulated aspects of interstate utility operations pursuant to [FPA] §§202 and 203, and under like directives contained in §§205, 206, and 207."[10]

Based on the mandates of sections 205 and 206 of the FPA and the case law interpreting the Commission's authority over transmission in interstate commerce, we conclude that we have ample legal authority—indeed, a responsibility—under section 206 of the FPA to order the filing of non-discriminatory open access transmission tariffs if we find such order necessary as a remedy for undue discrimination or anticompetitive effects.[11] We discuss below the primary court decisions that touch on our wheeling authority under sections 205 and 206.

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[10] *See Gulf States Utilities Company v. FPC*, 411 U.S. 747, 758-59 (1973).

[11] In most situations, discrimination that precludes transmission access or gives inferior access will have at least potential anticompetitive effects because it limits access to generation markets and thereby limits competition in generation. Similarly, it is probable that any transmission provision that has anticompetitive effects would also be found to be unduly discriminatory or preferential because the anticompetitive provision would most likely favor the transmission owner vis-a-vis others.

The Commission's authority to order access as a remedy for undue discrimination under the NGA was upheld and discussed in detail in *AGD*. In *AGD*, the court upheld in relevant part the Commission's Order No. 436.[12] That order found the prevailing natural gas company practices to be "unduly discriminatory" within the meaning of section 5 of the NGA (the parallel to section 206 of the FPA) and held that if pipelines wanted blanket certification for their transportation services, they must commit to transport gas for others on a non-discriminatory basis; in other words, they must provide non-discriminatory open access.

In upholding the Commission's authority to require open access, the court first noted that the opponents' arguments against such authority were "uphill." The statute contains no language forbidding the Commission to impose common carrier status on pipelines, let alone forbidding the Commission to impose "a specific duty that happens to be a typical or even core component of such status." The court found that the legislative history cited by the opponents came nowhere near overcoming this statutory silence. Rather, the legislative history supported only the proposition that Congress itself declined to impose common

[33,054]

carrier status.[13] Emphasizing Congress' deep concern with undue discrimination, the court found that the Commission had ample authority to "stamp out" such discrimination:

> The issue seems to come down to this: Although Congress explicitly gave the Commission the power and the duty to achieve one of the prime goals of

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12 Order No. 436, Regulation of Natural Gas Pipelines After Partial Wellhead Decontrol *FERC Statutes and Regulations, Regulation Preambles* ¶30,665 (1985).

13 *AGD, supra*, 824 F.2d at p. 997.

> common carriage regulation (the eradication of undue discrimination), the Commission's attempted exercise of that power is invalid because Congress in 1906 and 1914 and 1935 and 1938 itself refrained from affixing common carrier status directly onto the pipelines and from authorizing the Commission to do so. And this proposition is said to control no matter how sound the Order may be as a response to the facts before the Commission. We think this turns statutory construction upside down, letting the failure to grant a general power prevail over the affirmative grant of a specific one.[14]

The *AGD* court found that court decisions under the FPA did not support the view that the Commission's authority to "stamp out" undue discrimination is hamstrung by an inability to require non-discriminatory open access as a remedy. These decisions are discussed below.

One of the earliest cases on wheeling is *Otter Tail Power Company v. United States* (*Otter Tail*)[15] That case was a civil antitrust suit against an electric utility. The Court rejected the argument that the District Court could not order wheeling because to do so would conflict with the Federal Power Commission's (FPC) purported wheeling authority.[16] It pointed out that Congress had decided not to impose a common carrier obligation on the electric power industry and noted that the Commission was not at that time granted power to order wheeling. The *Otter Tail* case, however, did not address whether the Commission can require transmission in fulfillment of its duty to remedy undue discrimination.

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14 *Id.* at p. 998.

15 410, U.S. 366 (1974).

16 *Id.* at pp. 375-76.

Richmond Power & Light Company v. FERC (*Richmond*)[17] also did not involve requiring wheeling to remedy undue discrimination. In that case, the FPC, in reaction to the 1973 oil embargo, was attempting to reduce dependence on oil. The FPC requested that utilities with excess capacity wheel power to the New England Power Pool (NEPOOL). In response, several suppliers and transmission owners filed rate schedules with the FPC that provided for voluntary wheeling. Richmond Power & Light Company (Richmond) objected to these filings, claiming that they were unreasonable because they did not guarantee transmission access. The FPC refused to compel the utilities to wheel Richmond's power, stating that it did not have the authority to order a public utility to act as a common carrier.

The D.C. Circuit upheld the Commission. It acknowledged that Richmond's argument was persuasive in some respects, but stated that any conditions the Commission might impose could not contravene the FPA. The court examined the legislative history of the FPA and stated that "[i]f Congress had intended that utilities could inadvertently bootstrap themselves into common-carrier status by filing rates for voluntary service, it would not have bothered to reject mandatory wheeling. . . ."[18]

However, the D.C. Circuit in no way indicated that the Commission was foreclosed from ordering transmission as a remedy for undue discrimination. Richmond also had argued that the alleged refusal of the American Electric Power Company (AEP) and its affiliate, Indiana & Michigan Electric Company (Indiana), to wheel Richmond's excess energy was unlawful discrimination because AEP and Indiana wheeled higher-priced electricity from other AEP affiliates. The court acknowledged that Richmond's claim of

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17 574 F.2d 610 (D.C. Cir. 1978).

18 *Id.* at p. 620.

unlawful discrimination was theoretically valid, but found that Richmond had failed to prove its case. It noted that if Richmond had argued that the rates were unjustifiably discriminatory, or that Indiana's failure to use its transmission capability fully or to purchase less expensive electricity for wheeling resulted in unnecessarily high rates, a different case

[33,055]

would be before the court.[19] The case thus does not in any way limit the Commission's authority to remedy undue discrimination.

In *Central Iowa Power Cooperative v. FERC*,[20] the FPC[21] reviewed the terms of the Mid-Continent Area Power Pool (MAPP) Agreement under its section 205 and 206 authority. The agreement contained two membership limitations. First, the agreement established two classes of membership, with one class being entitled to more privileges than the other. Second, the agreement excluded non-generating distribution systems from pool services. The FPC found the first limitation on membership—the two-class system—to be unduly discriminatory and not reasonably related to MAPP's objectives. The FPC conditioned approval of the agreement under section 206 on the removal of the unduly discriminatory provision. The FPC found that the second limitation, the exclusion of non-generating distribution systems, was not anticompetitive and did not render the agreement inconsistent with the public interest.

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19 *Id.* at p. 623, nn.53 and 57.

20 606 F.2d 1156 (D.C. Cir. 1979).

21 While *Central Iowa* was pending, certain of the functions of the FPC were transferred to the FERC under the DOE Organization Act. Accordingly, the FERC was substituted for the FPC as the respondent in the case.

On appeal, the D.C. Circuit affirmed the FPC's decision. The court found that the FPC did have authority to order changes in the scope of the MAPP agreement, *if* the agreement was unjust, unreasonable, unduly discriminatory or preferential under section 206 of the FPA. The court stated:

> The Commission had authority, . . . under section 206 of the Act, . . . to order changes in the limited scope of the Agreement, including the addition of pool services, if, in the absence of such modifications, the Agreement presented "any rule, regulation, practice or contract [that was] unjust, unreasonable, unduly discriminatory or preferential."[22]

However, the court agreed with the FPC's conclusion that the limited scope of MAPP was not unjust, unreasonable, or unduly discriminatory. The court recognized that a pool was not invalid under section 206 merely because a more comprehensive arrangement was possible.

The D.C. Circuit upheld the Commission's refusal to eliminate the second limitation on membership by ordering MAPP participants to wheel to non-generating electric systems.[23] However, neither the Commission nor the court was presented with the argument that wheeling was necessary as a remedy for undue discrimination.

In *Florida Power & Light Company v. FERC* (*Florida*),[24] the Commission ordered Florida Power & Light Company (FP&L) to file a tariff setting forth FP&L's policy

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22 606 F.2d at p. 1168.

23 *Id.* at p. 1169; *see also Municipalities of Groton v. FERC*, 587 F.2d 1296 (D.C. Cir. 1978).

24 660 F.2d 668 (5th Cir. 1981), *cert. denied sub nom. Fort Pierce Utilities Authority v. FERC*, 459 U.S. 1156 (1983).

relating to the availability of transmission service.[25] FP&L objected to including such a policy statement in its tariff and argued that the filing of such a policy would convert FP&L into a common carrier by obligating it to offer service to all customers.[26] There was no finding that the action ordered was necessary to remedy undue discrimination.

The Fifth Circuit Court of Appeals agreed with FP&L that the mandatory filing of the policy statement would require FP&L to provide transmission service beyond its voluntary commitment because such a requirement would change

[33,056]

its duties and liabilities.[27] The Commission order would impose common carrier status on FP&L, the court found.[28]

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[25] FP&L provided transmission service when four conditions were met: (1) the specific potential seller and buyer were contractually identified; (2) the magnitude, time and duration of the transaction were specified prior to the commencement of the transmission; (3) it could be determined that the transmission capacity would be available for the term of the contract; and (4) the rate was sufficient to cover FP&L's costs.

[26] All utilities requesting wheeling services, subject to availability, would be entitled to receive transmission service under the filed terms. Any changes to a filed rate must be filed with the Commission. This is the so-called "filed rate doctrine." *See Northwestern Public Service Company v. Montana-Dakota Utilities Company*, 181 F.2d 19, 22 (8th Cir. 1980), *aff'd*, 341 U.S. 246 (1951).

[27] Under the filed rate doctrine, a refusal to wheel would be unduly discriminatory under section 206 of the FPA. As the court acknowledged, a customer refused service could petition the Commission to find that FP&L's policy of availability was unduly discriminatory under section 206(a) of the FPA. The court said that in the absence of a tariff on file, a utility refused wheeling services would be unable to claim discrimination under section 206(a) of the FPA. 660 F.2d at p. 675 (expressing "serious doubts that such a petition would be successful in the absence of a tariff").

[28] *Id.* at p. 676.

The court noted that the Commission did not rely on a finding of anticompetitive behavior and therefore the court did not address the Commission's power to remedy antitrust violations.[29]

The *AGD* court explicitly rejected the claim that the above line of cases establishes that the Commission lacks authority to require non-discriminatory open access.[30] Opponents of the Commission's order argued in *AGD* that *Richmond* and *Florida*, *supra*, stand for the proposition that the Commission cannot indirectly do what it allegedly cannot do directly, that is, impose common carriage. The *AGD* court rejected these arguments, stating that the petitioners read the electric cases far too broadly:

> [n]either *Richmond* nor *Florida* comes anywhere near stating that the Commission is barred from imposing an open-access condition in all circumstances.[31]

The court noted that the *Florida* case had expressly left open the question of whether the Commission would be entitled to use an open access condition as a remedy for anticompetitive conduct, and that in *Richmond* the D.C. Circuit had said little more than that unwillingness to transmit for all could not be automatically deemed undue discrimination. The court also noted the *Central Iowa case*, *supra*, in which it had upheld a Commission order that found a power pooling agreement discriminatory on its face because the agreement gave one class of membership

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29 *Id.* at p. 678.

30 The *AGD* court did not address *New York State Electric & Gas Corporation v. FERC*, 638 F.2d 388 (2d Cir. 1980), *cert. denied*, 454 U.S. 821 (1981) (*NYSEG*), presumably because that case did not concern whether the Commission could order wheeling as a remedy for undue discrimination.

31 824 F.2d at p. 999.

privileged status over another. The court stated that the Central Iowa case "upholds the power of the Commission to subject approval of a set of voluntary transactions to a condition that providers open up the class of permissible users."[32] The court added that it refused to "turn statutory construction upside down" by letting Congress' failure to grant a general power of common carriage prevail over the affirmative grant of the specific power to eradicate undue discrimination.[33]

We conclude that *AGD*'s analysis of undue discrimination under sections 4 and 5 of the Natural Gas Act is equally applicable to an undue discrimination analysis under sections 205 and 206 of the FPA. The Commission and courts have long recognized that the NGA was patterned after the FPA and that the two statutes should be interpreted in the same manner.[34] Thus, we conclude that we have the authority to remedy undue discrimination and anticompetitive effects by requiring all public utilities that own and/or control transmission facilities to file non-discriminatory open access transmission tariffs.

2. Section 211 Services

In concluding that we must invoke our section 206 authority to remedy undue discrimination and anticompetitive actions in the electric industry, we have carefully considered the goals of Title VII of the Energy

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32 *Id.* at p. 999.

33 *Id.* at p. 1006.

34 *See, e.g., FPC v. Sierra Pacific Power Company*, 350 U.S. 348, 353 (1956); *Arkansas Louisiana Gas Company v. Hall*, 453 U.S. 571, 577 n.7 (1981); and *Kentucky Utilities Company v. FERC*, 760 F.2d 1321, 1325 n.6 (D.C. Cir. 1985). Section 206 of the FPA was recently revised and now differs from section 5 of the NGA, but not in a manner significant to our discussion here. *See* 16 U.S.C.§§ 824e(b) and (c).

Policy Act, and whether section 211, by itself, is sufficient to remedy undue discrimination in public utility

[33,057]

transmission services.[35] Title VII of the Energy Policy Act, which amended section 211 of the FPA, reflects the intent of Congress to encourage competitive wholesale electric markets. Section 211 provides a means for wholesale power sellers and buyers to obtain transmission services necessary to compete in, or to reach, competitive markets, and is a valuable tool to encourage competitive markets. However, as discussed below, reliance on section 211 alone in some circumstances can result in the perpetuation of, rather than the elimination of, undue discrimination and anticompetitive effects.

First, there are inherent delays in the procedures for obtaining service under section 211. However, for competitive reasons, many transactions must be negotiated relatively quickly. Many competitive opportunities will be lost by the time the Commission can issue a final order under section 211. While we interpret section 211 to permit a customer or group of customers to seek broad tariff-like arrangements,[36] case-by-case section 211 proceedings are not a substitute for tariffs of general applicability that permit timely, non-discriminatory access on request.

Second, discrimination is inherent in the current industry environment in which some customers and sellers are served by open access systems, and others have to rely on negotiated

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35 In amending section 211 Congress left unaltered the authorities and obligations of the Commission under sections 205 and 206 (similar to our authorities and obligations under sections 4 and 5 of the Natural Gas Act) to remedy undue discrimination.

36 *See El Paso Electric Company and Central and South West Services, Inc.*, 68 FERC ¶61,181 at p. 61,916 (1994) (*CSW*), *reh'g pending*.

bilateral arrangements or the mandatory section 211 process. The end result is discrimination in the ability to obtain transmission services, as well as in the quality and prices of the services. This national patchwork of open and closed transmission systems cannot be cured effectively through section 211.

The Commission believes that its actions under sections 205 and 206 will complement the section 211 procedures in achieving the goals of creating more competitive bulk power markets and lower rates for consumers, while avoiding many years of costly and unnecessary litigation. Section 211 will be particularly important for developing non-discriminatory access by non-public utilities.

C. Background

1. Structure of the Electric Industry to Enactment of Federal Power Act

The Federal Power Act was enacted in an age of mostly self-sufficient, vertically integrated electric utilities, in which generation, transmission, and distribution facilities were owned by a single entity and sold as part of a bundled service (delivered electric energy) to wholesale and retail customers. Most electric utilities built their own power plants and transmission systems, entered into interconnection and coordination arrangements with neighboring utilities, and entered into long-term contracts to make wholesale requirements sales (bundled sales of generation and transmission) to municipal, cooperative, and other investor-owned utilities (IOUs) connected to each utility's transmission system. Each system covered limited service areas. This structure of separate systems arose naturally due primarily to the cost and technological limitations on the distance over which electricity could be transmitted.

Through much of the 1960s, utilities were able to avoid price increases, but still achieve increased profits, because of substantial increases in scale economies, technological

improvements, and only moderate increases in input prices.[37] Thus, there was no pressure on regulatory commissions to use regulation to affect the structure of the industry.[38]

2. Significant Changes in the Electric Industry

In the late 1960s and throughout the 1970s, a number of significant events occurred in the electric industry that changed the perceptions of utilities and

[33,058]

began a shift to a more competitive marketplace for wholesale power.[39] This was the beginning of periods of rapid inflation, higher nominal interest rates, and higher electricity rates.[40] During this time, consumers became concerned about higher electricity rates and questioned any price increases filed by utilities.[41]

During this same time frame, the construction of nuclear and other capital-intensive baseload facilities—actively encouraged by federal and some state governments—contributed to the continuing cost increases and uncertainties

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37 Paul L. Joskow, Inflation and Environmental Concern: Structural Change in the Process of Public Utility Regulation, 17 J. Law & Econ. 291, 312 (1974); *see also* Charles F. Phillips, Jr., *The Regulation of Public Utilities* 11 (1988).

38 See *Joskow*, *supra* note 37, at p. 312; *also* Phillips, *supra* note 37, at p. 12.

39 *See Joskow*, *supra* note 37, at p. 312; see *also* Phillips, *supra* note 37, at p. 12-13

40 *See Joskow*, *supra* note 37, at p. 312-13; *see also* Phillips, *supra* note 37, at p. 13. The Arab oil embargo resulted in significantly higher oil prices through the 1970s. *See Richard J. Pierce, Jr.*, The Regulatory Treatment of Mistakes in Retrospect: Canceled Plants and Excess Capacity, 132 U. Pa. L. Rev. 497, 501 (1984).

41 *See Joskow*, *supra* note 37, at p. 313; *see also* Phillips, *supra* note 37, at p. 13.

in the industry.[42] These investments were made based on the assumptions that there would be steady increases in the demand for electricity and continued large increases in the price of oil.[43] However, due to conservation and economic downturns, the expected demand increases did not materialize. Load growth virtually disappeared in some areas, and many utilities unexpectedly found themselves with excess capacity.[44] In addition, by the 1980s, the oil cartel collapsed, with a resulting glut of low- priced oil.[45] At the same time, inflation substantially increased the costs of these large baseload generating plants.[46] Surging interest rates further increased the cost of the capital needed to finance and capitalize these projects and completion schedules were significantly extended by, in part, more stringent safety and environmental requirements.[47]

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[42] *See generally Jersey Central Power & Light Company v. FERC*, 810 F.2d 1168, 1171 (D.C. Cir. 1987).

[43] *Id.*

[44] *See Pierce, supra* note 40, at p. 503. By 1983, the Department of Energy had estimated that the sunk costs for canceled nuclear plants alone amounted to $10 billion, *Id.* at p. 498.

[45] *Id.*

[46] *See Bernard S. Black & Richard J. Pierce Jr.*, The Choice Between Markets and Central Planning in Regulating the U.S. Electricity Industry, 93 Col. L. Rev. 1339, 1346 (1993) ("Actual costs of nuclear power plants vastly exceeded estimated, sometimes by as much as 1000%.").

[47] *See Phillips, supra* note 37, at p. 13. Fossil fuel-fired plants became subject to increased regulation as a result of the Clean Air Act of 1970, and its 1977 amendments, 42 U.S.C. § 7401-7642. In 1971, nuclear plant licensing became subject to the environmental impact statement requirements of the National Environmental Policy Act of 1969. 42 U.S.C. § 4332. Following the 1979 accident at the Three Mile Island nuclear plant, nuclear plants also became subject to additional safety regulations, resulting in higher costs. *See* Energy Information Administration, *The Changing Structure of the Electric Power Industry 1970-1991* (March 1993) 35. Between 1976 and 1980, most states and many localities instituted laws governing power plant siting.

As a result, expensive large baseload plants came onto the market or were in the process of being constructed, for which there was little or no demand. Accordingly, between 1970 and 1985, average residential electricity prices more than tripled in nominal terms, and increased by 25% after adjusting for general inflation.[48] Moreover, average electricity prices for industrial customers more than quadrupled in nominal terms over the same period and increased 86% after adjusting for inflation.[49] The rapidly increasing rates for electric power during this period, together with the opportunities provided by the Public Utility Regulatory Policies Act of 1978 (PURPA) (discussed *infra*), also prompted some industrial customers to bypass utilities by constructing their own generation facilities. This further exacerbated rate increases for remaining customers—primarily residential and commercial customers.

Consumers responded to these "rate shocks" by exerting pressure on regulatory bodies to investigate the prudence of management decisions to build generating plants, especially when construction resulted in cost overruns, excess capacity, or both. Between 1985 and 1992, writeoffs

[33,059]

of nuclear power plants totalled $22.4 billion.[50] These writeoffs significantly reduced the earnings of the affected utilities.[51] Delays in obtaining rate increases to reflect the effects of inflation further reduced investor returns. Thus, many utilities became reluctant to commit capital to long-

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[48] Based on retail prices reported in Energy Information Administration (EIA), Monthly Energy Review, January 1995, Table 9.9 (Prices adjusted for inflation using the GDP Deflator (1987 = 100)).

[49] *Id.*

[50] *See Black & Pierce, supra* note 46, at p. 1346 (These writeoffs were "about 17% of the book value of total 1992 utility investment.").

[51] *Id.*

term construction decisions involving large scale generating plants.[52]

In addition to economic changes in the industry, significant technological changes in both generation and transmission have occurred since 1935. Through the 1960s, bigger was cheaper in the generation sector and the industry was able to capitalize on economies of scale to produce power at lower per-unit costs from larger and larger plants.[53] As a result, large utility companies that could finance and manage construction projects of larger scale had a price advantage over smaller utility companies and customers who might otherwise have considered building their own generating units. Scale economies encouraged power generation by large vertically-integrated utility companies that also transmitted and distributed power. Beginning in the 1970s, however, additional economies of scale in generation were no longer being achieved.[54] A significant factor was that larger generation units were found to need relatively greater maintenance and experience longer downtimes.[55] The electric industry faced the situation "where the price of

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[52] *Id.* ("The high perceived risk of future disallowances reversed utilities' incentives to overinvest, and made utilities extremely reluctant to build new power plants.").

[53] *See* Preston Michie, Billing Credits for Conservation, Renewable, and Other Electric Power Resources: an Alternative to Marginal-Cost-Based Power Rates in the Pacific Northwest, 13 Environmental Law 963, 964-65 (1983).

[54] *Id.* at p. 965.

[55] Energy Information Administration, *The Changing Structure of the Electric Power Industry 1970-1991* (March 1993) 37 ("As larger units were constructed, however, utilities discovered that downtime was as much as 5 times greater for units larger than 600 megawatts than for units in the 100-megawatt range.").

each incremental unit of electric power exceeded the average cost."[56] Bigger was no longer better.

Further dictating against larger generation units were advances in technologies that allowed scale economies to be exploited by smaller size units, thereby allowing smaller new plants to be brought on line at costs below those of the large plants of the 1970s and earlier. Such new technologies include combined cycle units and conventional steam units that use circulating fluidized bed boilers.[57]

The combined cycle generating plants generally use natural gas as their primary fuel. This technology has been made possible by the development of more efficient gas turbines, shorter construction lead times, lower capital costs, increased reliability, and relatively minimal environmental impacts.[58] Similarly, the circulating fluidized bed combustion boilers, fueled by coal and other conventional fuels, provide a more efficient and less polluting resource.

Today, "the optimum size [of generation plants] has shifted from [more than 500 MW] (10-year lead time) to smaller units (one-year lead time) [in the 50- to 150-MW range]."[59] Indeed, smaller and more efficient gas-fired combined-cycle generation facilities can produce power on

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56 *Id.*; *see also* George A. Perrault, Downsizing Generation: Utility Plans for the 1990s, Pub. Util. Fort. 15-16 (Sept. 27, 1990) ("The large base-load generating units that form the backbone of utility systems are almost totally absent from capacity plans for the 1990s.").

57 "From 1982 through 1991, the average capacity of fluidized-bed units increased rapidly to 72 megawatts for 4 units in 1991. The average capacity for the 19 units planned to begin operating in 1992 through 1995 increases to 83 megawatts." Energy Information Administration, *The Changing Structure of the Electric Power Industry 1970-1991* (March 1993) 38.

58 *See* Charles E. Bayless, Less is More: Why Gas Turbines Will Transform Electric Utilities, Pub. Util. Fort. (Dec. 1, 1994) 21.

59 *Id.* at p. 24.

the grid at a cost between 3 and 5 cents per kWh.[60] This is significantly less than

[33,060]

the costs for large plants constructed and installed by utilities over the last decade, which were typically in the range of 4 to 7 cents per kWh for coal plants and 9 to 15 cents for nuclear plants.[61]

Significant changes have also occurred in the transmission sector of the industry. Technological advances in transmission have made possible the economic transmission of electric power over long distances at higher voltages.[62] This has made it technically feasible for utilities with lower cost generation sources to reach previously isolated systems where customers had been captive to higher cost generation. In addition, the nature and magnitude of coordination transactions[63] have changed dramatically since

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60 FERC staff calculations based in part on combined-cycle plant cost data reported in 1993 FERC Form No. 1 for a sample of units placed in service during 1990-92. Costs vary with regional fuel and construction costs, among other reasons.

61 Coal and Nuclear plant cost data reported in 1993 FERC Form No. 1 and the EIA report, *Electric Plant Cost and Power Production Expenses 1991*, 1993 DOE/EIA-0455(91), for plants placed in service during 1986-93; *see also* The 1994 Electric Executives' Forum, Bakke (President and CEO of the AES Corporation), Pub. Util. Fort. (June 1, 1994) 45 ("New generation can be built at about 3 cents per kilowatt-hour (U.S. average). Old generation costs about twice that....").

62 See Black & Pierce, *supra* note 46, at p. 1345 (In the late 1960s and 1970s, improved transmission efficiency and development of regional transmission networks "made it possible to build power plants up to 1000 miles from power users.").

63 Coordination transactions are voluntary sales or exchanges of specialized electricity services that allow buyers to realize cost savings or reliability gains that are not attainable if they rely solely on their own resources. For sellers, these transactions provide opportunities to earn

enactment of the FPA, allowing increased coordinated operations and reduced reserve margins. Substantial amounts of electricity now move between regions, as well as between utilities in the same region. Physically isolated systems have become a thing of the past.

3. The Public Utility Regulatory Policies Act and the Growth of Competition

In enacting PURPA,[64] Congress recognized that the rising costs and decreasing efficiencies of utility-owned generating facilities were increasing rates and harming the economy as a whole.[65] To lessen dependence on expensive foreign oil, avoid repetition of the 1977 natural gas shortage, and control consumer costs, Congress sought to encourage electric utilities to conserve oil and natural gas.[66] In particular, Congress sanctioned the development of alternative generation sources designated as "qualifying facilities" (QFs) as a means of reducing the demand for traditional fossil fuels.[67] PURPA required utilities to purchase power from

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additional revenue, and to lower customer rates, from capacity that is temporarily excess to native load capacity requirements.

64 Pub. L. No. 95-617, 92 Stat. 3117 (codified in U.S.C. sections 15, 16, 26, 30, 42 and 43).

65 *See* generally *FERC v. Mississippi*, 456 U.S. 742, 745-46 (1982).

66 The Power Plant and Industrial Fuel Use Act of 1978. Pub. L. No. 95-617, 92 Stat. 3117 (codified in U.S.C. sections 15, 16, 26, 30, 42, and 43).

67 QFs include certain cogenerators and small power producers. PURPA also added sections 210, 211 and 212 to the FPA, providing the Commission with authority to approve applications for interconnections and, in limited circumstances, wheeling. However, under section 211, as enacted in PURPA, the Commission could approve an application for wheeling only if it found, *inter alia*, that the order "would reasonably preserve existing competitive relationships." Because of this and other limitations in sections 211 and 212 as originally enacted, the provision was virtually ineffective. Only one section 211 order was ever issued pursuant to the original provision, and it was pursuant to a settlement.

QFs at a price not to exceed the utility's avoided costs and to sell backup power to QFs.[68]

PURPA specifically set forth limitations on who, and what, could qualify as QFs. In addition to technological and size criteria, PURPA set limits on who could own QFs.[69] Notwithstanding these limitations,

[33,061]

QFs proliferated. In 1989, there were 576 QF facilities. By 1993, there were more than 1,200 such facilities.[70] For the same time period, installed QF capacity increased from 27,429 megawatts to 47,774 megawatts.[71] The rapid expansion and performance of the QF industry demonstrated that traditional, vertically integrated public utilities need not be the only sources of reliable power.

During this period, the profile of generation investment began to change, and a market for non-traditional power

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See Public Service Company of Oklahoma, 38 FERC 61,050 (1987). As discussed *infra*, section 211 was subsequently revised by the Energy Policy Act of 1992.

[68] 456 U.S. at p. 750. Congress recognized that encouragement was needed in part because utilities had been reluctant to purchase electric power from, and sell power to, nonutility generators. *Id.* at p. 750-51.

[69] For example, PURPA provided that a cogeneration facility or small power production facility could not be owned by a person primarily engaged in the generation or sale of electric power (other than from cogeneration or small power production facilities). *See* 16 U.S.C. §§ 796(17) and (18).

[70] Energy Information Administration, *Electric Power Annual 1993* (December 1994) 124 (Table 77).

[71] *Id.* EIA data for 1989 through 1991 was for facilities of 5 megawatts or more and for 1992 and 1993 was for facilities of 1 megawatt or more. A comparison with Table 74 on page 121 for the years 1992 and 1993 reveals that this mixing of data bases is likely of minimal effect.

supply beyond the purchases required by PURPA began to emerge. QFs were limited to cogenerators and small power producers.[72] However, other non-traditional power producers who could not meet the QF criteria began to build new capacity to compete in bulk power markets, without such PURPA benefits as the mandatory purchase requirements. These producers, known as independent power producers (IPPs), were predominantly single-asset generation companies that did not own any transmission or distribution facilities. While traditional utilities were generally reluctant at that time to invest in new generating facilities under cost of service regulation, utilities increasingly became interested in participating in this new generation sector. They organized affiliated power producers (APPs), with assets not included in utility rate base, and sought to sell power in their own service territories and the territories of other utilities. At the same time, power marketers arose. These entities—owning no transmission or generation—buy and sell power.[73]

There were two major impediments to the development of IPPs and APPs. First, the ownership restrictions of the

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[72] Generally, the law has imposed an 80 MW cap on small power producers. A limited exception enacted in 1990 permitted small power facilities that could exceed 80 MW and still qualify as QFs under PURPA. This exception was limited to certain solar, wind, waste, and geothermal small power production facilities and only covered applications for certification of facilities as qualifying small power production facilities that were submitted no later than December 31, 1994 and for which construction commences no later than December 31, 1999. *See* Solar, Wind, Waste, and Geothermal Power Production Incentives Act of 1990, Pub. L. No. 101-575, 104 Stat. 2834 (1990), *amended*, Pub. L. No. 102-46, 105 Stat. 249 (1991).

[73] The first power marketer in the electric industry was Citizens Energy Corporation. *See Citizens Energy Corporation*, 35 FERC ¶61,198 (1986). Power marketers take title to electric energy. Power brokers, on the other hand, do not take title and are limited to a matchmaking role.

Public Utility Holding Company Act (PUHCA)[74] severely inhibited these new entities from entering the generation business.[75] Second, these entities needed transmission service in order to compete in electricity markets.

While the Commission had no authority to remove PUHCA restrictions,[76] it encouraged the development of IPPs and APPs, as well as emerging power marketers, by authorizing market-based rates for their power sales on a case-by-case basis and by encouraging more widely available transmission access. From 1989 through 1993, facilities owned by IPPs and other non-traditional generators (other than QFs) increased from 249 to 634 and their installed capacity increased from 9,216 megawatts to 13,004 megawatts.[77] Indeed, "[i]n 1992, for the first time, generating capacity added by independent producers exceeded capacity added by utilities."[78]

Market-based rates helped to develop competitive bulk power markets. A generating utility allowed to sell its power at

[33,062]

market-based rates could move more quickly to take advantage of short-term or even long-term market

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74 15 U.S.C. §§ 79 *et. seq.*

75 As discussed *infra*, Congress eventually provided a means to avoid the PUHCA restrictions by creating exempt wholesale generators (EWGs) in the Energy Policy Act.

76 The industry was successful to some extent in developing ownership structures that permitted such investment. *See, e.g., Commonwealth Atlantic Limited Partnership*, 51 FERC ¶61,368 at p. 62,240 and n.20 (1990).

77 Energy Information Administration, *Electric Power Annual 1993* (December 1994) 124 (Table 77).

78 Black & Pierce, *supra* note 46, at p. 1349 n. 25.

opportunities than those laboring under traditional cost-of-service tariffs, which entail procedural delays in achieving tariff approvals and changes.

In approving these market-based rates, the Commission required, *inter alia*, that the seller and any of its affiliates lack market power or mitigate any market power that they may have possessed.[79] The major concern of the Commission was whether the seller or its affiliates could limit competition and thereby drive up prices. A key inquiry became whether the seller or its affiliates owned or controlled transmission facilities in the relevant service area and therefore, by denying access or imposing discriminatory terms or conditions on transmission service, could foreclose other generators from competing.[80] As we have previously explained:

> The most likely route to market power in today's electric utility industry lies through ownership or control of transmission facilities. Usually, the source of market power is dominant or exclusive *ownership* of the facilities. However, market power also may be gained without ownership. Contracts can confer the same rights of control. Entities with contractual control over transmission facilities can withhold supply and extract monopoly prices just as effectively as those who control facilities through ownership.[81]

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79 *See, e.g., Ocean State Power*, 44 FERC ¶61,261 (1988); *Commonwealth Atlantic Limited Partnership*, 51 FERC ¶61,368 (1990); *Citizens Power & Light Company*, 48 FERC ¶61,210 (1989); *Orange and Rockland Utilities, Inc.* 42 FERC ¶61,012 (1988); *Doswell Limited Partnership*, 50 FERC ¶61,251 (1990) (Doswell); and *Dartmouth Power Associates Limited Partnership*, 53 FERC ¶61,117 (1990).

80 *See, e.g., Doswell*, 50 FERC at p. 61,757.

81 *Citizens Power & Light Corporation*, 48 FERC ¶61,210 at p. 61,777 (1989) (emphasis in original); *see also Utah Power & Light Company*,

As entry into wholesale power generation markets increased, the ability of customers to gain access to the transmission services necessary to reach competing suppliers became increasingly important.[82] In addition, beginning in the late 1980s, public utilities seeking Commission approval of mergers or consolidations under section 203 of the FPA or Commission authorization for blanket approval of market-based rates for generation services under section 205 of the FPA, filed "open access" transmission tariffs of general applicability to mitigate their market power to meet Commission conditions.[83] The Commission applied its

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PacifiCorp and PC/UP&L Merging Corporation, 45 FERC ¶61,095 at p. 61,287-89 (1988), *order on reh'g*, 47 FERC ¶61,209, *order on reh'g*, 48 FERC ¶61,035 (1989), *remanded in part sub nom. Environmental Action, Inc. v. FERC*, 939 F.2d 1057 (D.C. Cir. 1991), *order on remand*, 57 FERC ¶61,363 (1991).

[82] In earlier years, a few customers were able to obtain access as a result of litigation, beginning with the Supreme Court's decision in *Otter Tail*, 410 U.S. 366 (1973). Additionally, some customers gained access by virtue of Nuclear Regulatory Commission license conditions and voluntary preference power transmission arrangements associated with federal power marketing agencies. *See, e.g., Consumers Power Company*, 6 NRC 887, 1036-44 (1977) and *The Toledo Edison Company and Cleveland Electric Illuminating Company*, 10 NRC 265, 327-34 (1979). *See Florida Municipal Power Agency v. Florida Power Power and Light Company*, 839 F. Supp. 1563 (M.D. Fla. 1993). *See also* Electricity Transmission: Realities, Theory and Policy Alternatives, The Transmission Task Force Report to the Commission, October 1989, 197.

[83] *See, e.g., Public Service Company of Colorado*, 59 FERC ¶1,311 (1992), *reh'g denied*, 62 FERC ¶61,013 (1993); *Utah Power & Light Company, et al.*, Opinion No. 318, 45 FERC ¶61,095 (1988), *order on reh'g*, Opinion No. 318-A, 47 FERC ¶61,209 (1989), *orders on reh'g*, Opinion No. 318-B, 48 FERC ¶61,035 (1989), *aff'd in relevant part sub nom. Environmental Action Inc. v. FERC*, 939 F.2d 1057 (D.C. Cir. 1991); *Northeast Utilities Service Company (Public Service Company of New Hampshire)*, Opinion No. 364-A, 58 FERC ¶61,070, *reh'g denied*, Opinion No. 364-B, 59 FERC ¶61,042, *order granting motion to vacate and dismissing request for rehearing*, 59 FERC ¶61,089 (1992), *affirmed in relevant part sub nom. Northeast Utilities Service Company v. FERC*, 993 F.2d 937 (1st Cir. 1993).

market rate analysis to IOUs, as well as IPPs, APPs, and marketers, and allowed IOUs to sell at market-based rates only if they opened their transmission systems to competitors.[84] The Commission also approved

[33,063]

proposed mergers on the condition that the merging companies remedy anticompetitive effects potentially caused by the merger by filing "open access" tariffs. These early "open access" tariffs required only that the companies provide point-to-point transmission services, which is a much narrower requirement than that being proposed in this rule. However, only 21 public utilities have any form of open access transmission; the vast majority of IOUs still do not provide any form of "open access" transmission over their transmission systems.

The economic and technological changes in the transmission and generation sectors helped give impetus to the many new entrants in the generating markets who could sell electric energy profitably with smaller scale technology at a lower price than many utilities selling from their existing generation facilities at rates reflecting cost. However, the advantages of these technological advances can be achieved only if more efficient generating plants can obtain access to the regional transmission grids. Because the traditional vertically integrated utilities still favor their own generation if and when they provide transmission access to third parties, barriers continue to exist to cheaper, more efficient generation sources.

4. The Energy Policy Act

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[84] *See, e.g., Public Service of Indiana, Inc.* 51 FERC ¶61,367 (1990), *reh'g denied*, 52 FERC ¶61,260 (1990), *appeal dismissed sub nom. Northern Indiana Public Service Company v. FERC*, 954 F.2d 736 (D.C. Cir. 1992).

In response to the competitive developments following PURPA, and the fact that PUHCA and lack of transmission access[85] remained major barriers to new generators, Congress enacted Title VII of the Energy Policy Act of 1992 (Energy Policy Act).[86] A goal of the Energy Policy Act was to promote greater competition in bulk power markets by encouraging new generation entrants, known as exempt wholesale generators (EWGs), and by expanding the Commission's authority under sections 211 and 212 of the FPA to approve applications for transmission services.[87]

An EWG is defined as

> any person determined by the Federal Energy Regulatory Commission to be engaged directly, or indirectly through one or more affiliates as defined in [PUHCA] section 2(a)(11)(B), and exclusively in the business of owning or operating, or both owning and operating, all or part of one or more eligible facilities and selling electric energy at wholesale.[88]

If the Commission, upon an application, determines that a person is an EWG, that person will be exempt from PUHCA.[89] This provision removed a significant impediment to the development of IPPs and APPs by allowing them to

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85 *See infra* sections III.D.1 and 2.

86 Pub. L. No. 102-486, 106 Stat. 2776 (1992).

87 *See El Paso Electric Company and Central and South West Services, Inc.*, 68 FERC ¶61,181 at p. 61,914 (1994); *see also* Paul Kemezis, FERC's Competitive Muscle: The Comparability Standard, Electrical World 45 (Jan. 1995) ("In EPAct, Congress made it clear that the electric-power industry was to move toward a fully competitive market system, but left most of the implementation to FERC.")

88 15 U.S.C. § 79z-5a.

89 15 U.S.C. § 79z-5a(e).

develop projects as EWGs free from the strictures of PUHCA or the QF PURPA limitations.

While sections 211 and 212, as enacted by PURPA, were intended to provide greater access to the transmission grid, the limitations placed on these sections made them unusable in most circumstances.[90] However, as amended by the Energy Policy Act, these sections now give the Commission broader authority to order transmitting utilities to provide wholesale transmission services, upon application, to any electric utility, Federal power marketing agency, or any other person generating electric energy for sale for resale.

The Energy Policy Act also added section 213 to the FPA. Section 213(a) requires a transmitting utility that does not agree to provide wholesale transmission service in accordance with a good faith request to provide a written explanation of its proposed rates, terms, and conditions and its analysis of any physical or other constraints.[91] Section 213(b) required the Commission to enact a rule

[33,064]

requiring transmitting utilities to submit annual information concerning potentially available transmission capacity and known constraints.[92]

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90 *See supra* note 67.

91 *See* Policy Statement Regarding Good Faith Requests for Transmission Services and Responses by Transmitting Utilities Under Sections 211(a) and 213(a) of the Federal Power Act, as Amended and Added by the Energy Policy Act of 1992, 58 FR 38964 (July 21, 1993), *FERC Statutes and Regulations, Regulations Preambles* ¶30,975 (1993) (Policy Statement Regarding Good Faith Requests for Transmission Services).

92 *See* Order No. 558, *New Reporting Requirements Implementing Section 213(b) of the Federal Power Act and Supporting Expanded Regulatory Responsibilities Under the Energy Policy Act of 1992, and Conforming and Other Changes to Form No. FERC-714*, *FERC Statutes and Regulations, Regulations Preambles* ¶30,980, *reh'g denied*, Order

5. The Present Competitive Environment.

Following the Energy Policy Act, the Commission established rules: (1) for certain generators to obtain EWG status and thus an exemption from PUHCA;[93] and (2) that required transmission information availability. The Commission also pursued a number of initiatives aimed at fostering the development of more competitive bulk power markets, including aggressive implementation of section 211, a new look at undue discrimination under the FPA, easing of market entry for sellers of generation from new facilities, and initiation of a number of industry-wide reforms. As stated by the Commission, in recognition of the Congressional goal in the Energy Policy Act of creating competitive bulk power markets:

> Our goal is to facilitate the development of competitively priced generation supply options, and to ensure that wholesale purchasers of electric energy can reach alternative power suppliers and vice versa.[94]

No. 558-A, 65 FERC ¶61,324 (1993), *regulations modified*, 59 FR 15333 (April 1, 1994), FERC *Statutes and Regulations, Regulations Preambles* ¶30,993.

93 *See* Order No. 550, *Filing Requirements and Ministerial Procedures for Persons Seeking Exempt Wholesale Generator Status*, 58 FR 8897 (February 18, 1993), FERC *Statutes and Regulations, Regulations Preambles* ¶30,964, *order on reh'g*, Order No. 550-A, 58 FR 21250 (April 20, 1993), *FERC Statutes and Regulations, Regulations Preambles* ¶30,969 (1993). As recognized by Congress and the Commission, availability of transmission information is critical in developing competitive markets. *See supra* notes 91 and 92. This opened the "black box" of information that previously was available only to transmission owners.

94 See Stranded Cost NOPR at p. 32,866; *American Electric Power Service Corporation*, 67 FERC ¶61,168, *clarified*, 67 FERC ¶61,317 (1994).

a. Use of Sections 211 and 212 to Obtain Transmission Access. The Commission has aggressively implemented sections 211 and 212 of the FPA, as amended by the Energy Policy Act, in order to promote competitive markets.[95] When wheeling requests under sections 211 and 212 have been made, the Commission has required wheeling in almost all of the requests it has processed. To date, the Commission has issued orders requiring wheeling in 9 of the 10 cases it has acted on, including 3 proposed orders and 6 final orders.[96]

As a general matter, section 211 has permitted some inroads to be made by customers in obtaining transmission service from public utilities that historically have declined to provide access to their systems, or have offered service only on a discriminatory basis. Under section 211, the Commission has granted requests for the broader type of service that most utilities historically have refused to provide—network service. Although transmission owners have provided limited amounts of unbundled point-to-point transmission service, third-party customers have not been able to obtain the flexibility of service that transmission owners enjoy.

In *Florida Municipal*, a section 211 case, the Commission ordered "network," rather than the narrower "point-to-point," service.[97] Network service permits

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95 16 U.S.C.A. §§824j-824k (West 1985 and Supp. 1994).

96 *See, e.g.* final orders issued in *City of Bedford*, 68 FERC ¶61,003 (1994), *reh'g pending*, *Florida Municipal Power Agency v. Florida Power & Light Company*,, 67 FERC ¶61,167 (1994), *reh'g pending Minnesota Municipal Power Agency*, 68 FERC ¶61,060 (1994); and *Tex-La Electric Cooperative of Texas*, 69 FERC ¶61,269 (1994); see also supra note 168.

97 *See Florida Municipal Power Agency v. Florida Power & Light Company*, 65 FERC ¶61,125, *reh'g dismissed*, 65 FERC ¶61,372 (1993), *final order*, 67 FERC ¶61,167 (1994), *reh'g pending*. The Commission has "characterized point-to-point service as involving designated points

[33,065]

the applicant to fully integrate load and resources on an instantaneous basis in a manner similar to the transmission owner's integration of its own load and resources. At the same time, the Commission made the generic finding that the availability of transmission service will enhance competition in the market for power supplies and lead to lower costs for consumers. The Commission explained that as long as the transmitting utility is fully and fairly compensated and there is no unreasonable impairment of reliability, transmission service is in the public interest.[98]

As discussed in more detail above, however, our preliminary conclusion is that section 211 alone is not enough to eliminate undue discrimination. The significant time delays involved in filing an individual service request for bilateral service under section 211 places the customer at a severe disadvantage compared to the transmission owner and can result in discriminatory treatment in the use of the transmission system. It is an inadequate procedural substitute for readily available service under a filed non-discriminatory open access tariff. As the Commission noted in *Hermiston Generating Company*, "[t]he ability to spend time and resources litigating the rates, terms and conditions of transmission access is not equivalent to an enforceable

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of entry into and exit from the transmitting utility's system, with a designated amount of transfer capability at each point." *El Paso Electric Company v. Southwestern Public Service Company*, 68 FERC ¶61,182 at p. 61,926 n. 9 (1994) (*citing Entergy Services, Inc.*, 58 FERC ¶61,234 at p. 61,768 (1993), *reh'g dismissed*, 68 FERC ¶61,399 (1994)). Network service allows more flexibility by allowing a transmission customer to use the entire transmission network to provide generation service for specified resources and specified loads without having to pay multiple charges for each resource-load pairing.

98 *Florida Municipal*, 67 FERC at p. 61,477.

voluntary offer to provide comparable service under known rates, terms and conditions."[99]

b. Commission's Comparability Standard. In the Spring of 1994, the Commission began to address the problem of the disparity in transmission service that utilities provided to third parties in comparison to their own uses of the transmission system. In the seminal case in this area, *American Electric Power Service Corporation* (*AEP*), the company voluntarily proposed a tariff of general applicability that would offer firm, point-to-point transmission service for a minimum of one month.[100] The Commission accepted the proposed transmission tariff for filing and suspended its effectiveness for one day, subject to refund.[101] Rehearing requests challenged the Commission's summary approval of the restriction of service to point-to-point as being discriminatory and anticompetitive.[102] The rehearing requests argued that the tariff should be expanded to include network services such as those used by the transmission owner. On rehearing, the Commission announced a new standard for evaluating claims of undue discrimination.

The Commission found that a voluntarily offered, new open access transmission tariff that did not provide for services comparable to those that the transmission owner provided itself was unduly discriminatory and

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[99] 69 FERC ¶61,035 at p. 61,165 (1994), *reh'g pending, See also Southwest Regional Transmission Association*, 69 FERC ¶61,100 at p. 61,398 (1994) (*SWRTA*).

[100] 64 FERC ¶61,279 (1993), *reh'g granted*, 67 FERC ¶61,168, *clarified*, 67 FERC ¶61,317 (1994).

[101] The Commission explained that AEP could limit the service it was offering because it was "providing the service voluntarily under a tariff of general applicability." 64 FERC at p. 62,978.

[102] *AEP*, 67 FERC at p. 61,489.

anticompetitive.[103] In reaching that conclusion, the Commission broadened its undue discrimination analysis (which traditionally had focused on the rates, terms, and conditions faced by similarly situated third-party customers)

[33,066]

to include a focus on the rates, terms, and conditions of a utility's own uses of the transmission system:

> [A]n open access tariff that is not unduly discriminatory or anticompetitive should offer third parties access on the same or comparable basis, and under the same or comparable terms and conditions, as the transmission provider's uses of its system.[104]

Refocusing the analysis was necessitated by the changing conditions in the electric utility industry, including the emergence of non-traditional suppliers and greater competition in bulk power markets. Because a transmission provider may use its system in different ways (*e.g.*, to integrate load and resources when serving retail native load, to make off-system sales or purchases, or to serve wholesale requirements customers), the Commission set for hearing the factual issues associated with identifying those uses, as well

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103 With respect to anticompetitive effects, the Commission explained that it has "adhered to the Supreme Court's determination that the Commission's 'important and broad regulatory power . . . carries with it the responsibility to consider, in appropriate circumstances, the anticompetitive effects of regulated aspects of interstate utility operations pursuant to §§ 202 and 203, and under like directives contained in §§ 205, 206 and 207.' *Gulf States Utilities Company v. FPC*, 411 U.S. 747, 758-59 (1972)." *Id.* at p. 61,490 (footnote omitted). The Commission reaffirmed that it would examine how best to fulfill this responsibility, as well as its responsibility to prevent undue discrimination, in light of the changing conditions in the electric utility industry. *Id.*

104 *Id.* at p. 61,490.

as any potential impediments or consequences to providing comparable services to third parties.[105]

After *AEP*, the Commission applied this comparability standard to a proposed open access transmission tariff that was filed by Kansas City Power & Light Company in support of a proposal to sell generation at market-based rates.[106] The Commission explained that, in light of *AEP*, the utility's proposed open access transmission tariff (which provided only for point-to-point service) did not adequately mitigate its transmission market power so as to justify allowing the requested market-based rates. KCP&L could charge market-based rates for sales only if it modified its proposed transmission tariff to reflect the *AEP* comparability standard.

Since then, the Commission has required comparable service in a variety of contexts, and has set for hearing the factual issues associated with comparable service. For example, the Commission found that market power can be adequately mitigated only if a merged company offers transmission services in accordance with the *AEP* comparability standard.[107] The Commission further held that, even if a merger does not result in an increase in market power, the merger would not be consistent with the public interest under section 203 of the FPA unless the merged company offers comparable transmission services, as defined in *AEP*.[108] The Commission therefore announced a transmission comparability requirement for all new mergers:

> Given the transition of the electric utility industry as a whole, we conclude that, absent other compelling

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105 *Id.* at p. 61,490-91.

106 *See Kansas City Power & Light Company*, 67 FERC ¶61,183 (1994), *reh'g pending*.

107 *E.g. CSW, supra* 68 FERC at p.61,914.

108 *Id.*

> public interest considerations, coordination in the public interest can best be secured only if merging utilities offer comparable transmission services.[109]

In *Heartland Energy Services, Inc.*,[110] the Commission applied its comparability standard to an affiliated electric power marketer seeking blanket authorization to sell electricity at market-based rates. The Commission explained that for all future cases involving blanket approval of market-based rates an offer of comparable transmission services will be required before the Commission will be able to find that transmission market power has been adequately mitigated. In the context of an affiliated power marketer, this means that all of its affiliated utilities must have a comparable transmission tariff on file.[111]

The Commission also denied a request by a company affiliated with a transmission-owning utility seeking permission to sell power at market-based rates to a particular customer. The denial was without prejudice to refiling such a request in a new section 205 proceeding, but only after the

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109 *Id.* at p. 915 (footnote omitted).

110 68 FERC ¶61,223 (1994).

111 *Id.* at p. 62,060. In *InterCoast Power Marketing Company*, 68 FERC ¶61,248, *clarified*, 68 FERC ¶61,324 (1994), the Commission rejected an affiliated marketer's proposal to sell at market rates without its affiliate utility offering comparable transmission services. The Commission stated that the only way to ensure that InterCoast does not have transmission market power is to require its affiliated public utility to offer comparable transmission services. *See also LG&E Power Marketing Inc.*, 68 FERC ¶61,247 at p. 62,120-21 (1994). The Commission added that this is consistent with encouraging competitive bulk power markets as envisioned by the Energy Policy Act of 1992. Id. at p. 62,132.

affiliated transmission-owning utility filed a comparable transmission service tariff.[112]

The Commission added that it will require comparability in any situation in which a seller seeking market-based rates is affiliated with an owner or controller of transmission facilities.[113]

The Commission has also stated that "it will henceforth apply the transmission comparability standard announced in the *AEP* case to all transmitting utility members of an RTG."[114] The Commission further declared that comparable services must be provided through "open access" tariffs rather than only on a contract-by-contract basis:

> [T]ariffs are essential to the provision of comparable services. Tariffs set out the services that are available and the terms and conditions under which those services will be made available....[In contrast], a negotiation process creates uncertainty and imposes on customers delay and other transaction costs that the transmitting utility members of an RTG do not incur when using the transmission for

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112 *See Hermiston Generating Company*, 69 FERC ¶61,035 at p. 61,164 (1994), *reh'g pending*. The Commission subsequently accepted the rates on a cost basis. See Letter Order dated November 10, 1994.

113 *Id.* at p. 61,165.

114 *See SWRTA*, 69 FERC at p. 61,397; see also PacifiCorp, the California Municipal Utilities Association, and the Independent Energy Producers (on behalf of Western Regional Transmission Association), 69 FERC ¶ 61,099 *order on reh'g*, 69 FERC ¶ 61,352 (1994) (*WRTA*). An RTG is a regional transmission group. It is defined as "a voluntary organization of transmission owners, transmission users, and other entities interested in coordinating transmission planning (and expansion), operation and use on a regional (and inter-regional)." Policy Statement Regarding Regional Transmission Groups, 58 FR 41626 (August 5, 1993), *FERC Statutes and Regulations, Regulations Preambles* ¶ 30,976 at p. 30,870 n.4 (RTG Policy Statement).

> their own benefit. Moreover, the ability to execute separate transmission agreements with different but similarly situated customers is the ability to unduly discriminate among them. A tariff ensures against such discrimination in the RTG.[115]

Thus, the Commission required the RTGs to amend their bylaws to commit all transmitting utility members to offer comparable transmission services to other RTG members pursuant to a transmission tariff or tariffs.

Most recently, the Commission has set for hearing whether transmission tariffs meet the *AEP* comparability standard in Commonwealth Edison Company,[116] Wisconsin Electric Power Company,[117] and Wisconsin Public Service Corporation.[118] In all three cases, the company agreed in principle to provide comparable service, but issues arose as to what constitutes such service.

c. Lack of Market Power in New Generation. In *KCP&L*, discussed in the prior section, the Commission continued to recognize that transmission remains a natural monopoly. However, it found that, in light of the industry and statutory changes that now allow ease of market entry, no wholesale seller of generation has market power in generation from *new* facilities.[119] In particular, the Commission explained that it had previously noted in *Entergy Services, Inc.* that there was significant evidence that non-traditional power project developers, including

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115 *SWRTA*, 69 FERC at p. 61,398.

116 70 FERC ¶ 61,204 (1995).

117 70 FERC ¶ 61,074 (1995).

118 70 FERC ¶ 61,075 (1995).

119 *KCP&L*, 67 FERC ¶ 61,183 (1994).

qualifying facilities and independent power projects, are becoming viable competitors in long-run markets.[120]

The Commission further explained that since *Entergy*, Congress had enacted the Energy Policy Act, which had lowered barriers to the entry of new suppliers by creating a new class of power suppliers—EWGs—that are exempt from the provisions of PUHCA.[121] The Commission concluded that, in considering market-based rate proposals for generation sales, it need only focus on market power in transmission,

[33,068]

generation market power in short-run markets, and other barriers to entry.[122]

d. Further Commission Action Addressing a More Competitive Electric Industry. To address the fact that the electric industry is becoming more competitive, and to remove barriers that might inhibit a more competitive industry, the Commission has initiated a number of additional proceedings: (1) Stranded Cost Notice of Proposed Rulemaking,[123] (2) Transmission Pricing Policy Statement,[124]

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[120] *Id.* at p. 61,557 (citing *Entergy Services, Inc.*, 58 FERC ¶ 61,234 at p. 61,756 and nn.63 and 65 (*Entergy*)).

[121] *Id.* The Commission added that "after examining generation dominance in many different cases over the years, we have yet to find an instance of generation dominance in long-run bulk power markets." *Id.*

[122] *Id.* In *KCP&L*, the Commission declined to dismiss the possibility of market power in generation associated with sales out of *existing* capacity. As noted, however, we here seek comments on whether, and if so under what conditions, to drop the generation dominance standard in short-run markets, *i.e.*, for sales from existing capacity.

[123] *See supra* note 5.

[124] *See Inquiry Concerning the Commission's Pricing Policy for Transmission Services Provided by Public Utilities Under the Federal Power Act*, 59 FR 50331 (November 3, 1994), *FERC Statutes and*

(3) Pooling Notice of Inquiry,[125] and (4) Regional Transmission Group (RTG) Policy Statement.[126]

In the Stranded Cost NOPR the Commission recognized that the trend toward greater transmission access and the transition to a fully competitive bulk power market could cause some utilities to incur stranded costs as wholesale requirements customers (or retail customers) use their supplier's transmission to purchase power elsewhere. As the Commission noted, a utility may have built facilities or entered into long-term fuel or purchased power supply contracts with the reasonable expectation that its customers would renew their contracts and would pay their share of long-term investments and other incurred costs. If the customer obtains another power supplier, the utility may have stranded costs. If the utility cannot locate an alternative buyer or somehow mitigate the stranded costs, the Commission explained that "the costs must be recovered from either the departing customer or the remaining customers or borne by the utility's shareholders."[127] Accordingly, the Commission proposed to establish provisions concerning the recovery of wholesale and retail stranded costs by public utilities and transmitting utilities.[128]

Regulations, Regulations Preambles ¶ 31,005 (Transmission Pricing Policy Statement).

[125] *See Inquiry Concerning Alternative Power Pooling Institutions Under the Federal Power Act*, 59 FR 54851 (October 26, 1994), *FERC Statutes and Regulations*, Notices ¶ 35,529 (1995) (Pooling Notice of Inquiry).

[126] *See Policy Statement Regarding Regional Transmission Groups*, 58 FR 41626 (August 5, 1993); *FERC Statutes and Regulations, Regulations Preambles* ¶ 30,976 (RTG Policy Statement).

[127] Stranded Cost NOPR at p. 32,864.

[128] The Commission herein is making preliminary findings on stranded costs and issuing a supplemental Stranded Cost NOPR, seeking

In the Transmission Pricing Policy Statement, the Commission announced a new policy providing greater flexibility in the pricing of transmission services provided by public utilities and transmitting utilities. The Commission traditionally had allowed only postage-stamp, contract-path pricing.[129] Under the new policy, it will permit a variety of proposals, including distance sensitive and flow-based pricing,[130] which may be more suitable for competitive wholesale power markets. The Commission explained that this "[g]reater pricing flexibility is appropriate in light of the significant competitive

[33,069]

changes occurring in wholesale generation markets, and in light of our expanded wheeling authority under the Energy Policy Act of 1992."[131] However, the Commission explained that any new transmission pricing proposal must meet the Commission's *AEP* comparability standard. The Commis-

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comments on the impact of our proposed open access NOPR on stranded costs.

[129] Most transmission contracts set a single price for energy flow over a utility's transmission system. This single-price policy is called "postage stamp" pricing because the rate does not depend on how far the power moves within a company's transmission system. If power flows through several companies, traditional industry practice is to specify that power flows along a "contract path" consisting of the transmission-owning utilities between the ultimate receipt and delivery points. *See infra* discussion of *Indiana Michigan Power Company*, 64 FERC ¶ 61,184.

[130] Unlike with postage stamp pricing, with distance-sensitive pricing the cost of moving power through a company depends on how far the power moves within the company. In contrast to contract path pricing, flow-based pricing establishes a price based on the costs of the various parallel paths actually used when the power flows. Because flow-based pricing can account for all parallel paths used by the transaction, all transmission owners with facilities on any of the parallel paths would be compensated for the transaction.

[131] Transmission Pricing Policy Statement at p. 31,136.

sion further explained that comparability of service applies to price as well as to terms and conditions.[132]

The Commission issued the Pooling Notice of Inquiry to receive comments on traditional power pools and on alternative power pooling institutions that are being explored in today's more competitive environment. The Commission expressed concern that [g]iven the ongoing changes in the competitive environment of the electric utility industry—in particular, the potential for substantially increased access to transmission—we must consider whether we are appropriately balancing our dual objectives of promoting coordination and competition.[133] Accordingly, the Commission explained that it wished to look at alternative power pooling institutions and to re-examine the role of more traditional power pools in today's environment of increased competition. In particular the Commission expressed its intent to ensure that its policies "are consistent with the development of a competitive bulk power market."[134]

In the RTG Policy Statement, the Commission announced a policy encouraging the development of RTGs. The Commission explained that a primary purpose of RTGs is to facilitate transmission access for potential users and voluntarily resolve disputes over such service. The Commission has recently conditionally approved the formation of two RTGs.[135] One of the conditions is that each RTG member must offer comparable transmission services by tariff to other RTG members.

In addition to the Commission's actions, a number of states have initiated proceedings concerning retail wheeling

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132 *Id.* at p. 31,142.

133 Pooling Notice of Inquiry at p. 35,715.

134 *Id.* at p. 35,714.

135 *See WRTA* and *SWRTA*, *supra*.

or proposed legislation for retail wheeling, that is, for ultimate consumers to choose their supplier of power.[136]

D. Need for Reform

The many changes discussed above have converged to create a situation in which new generating capacity can be built and operated at prices substantially lower than many utilities' embedded costs of generation. As discussed above, new generation facilities can produce power on the grid at a cost of 3 to 5 cents per kWh, yet the costs for large plants constructed and installed over the last decade were typically in the range of 4 to 7 cents per kWh for coal plants and 9 to 15 cents for nuclear plants. Non-traditional generators are taking advantage of this opportunity to compete. Indeed, the non-traditional generators' share of total U.S. electricity generation increased from 4 percent in 1985 to 10 percent in 1993.[137] Much of this increased share of generation is the result of competitive bidding for new generation resources that has occurred in 37 states. Since 1984, almost 4,000 projects, representing over 400,000 MW, have been offered in response to requests. Over 350 projects have been selected to supply 20,000 MW, and, of these, 126 are now

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[136] The Energy Information Administration recently indicated that at least nine states—California, Connecticut, Illinois, Michigan, Nevada, Ohio, Texas, Utah, and Vermont have proposals or legislation for retail wheeling. EIA, *Performance Issues for a Changing Electricity Power Industry*, January 1995 19-22. Most prominent among the recent state proposals are the California Public Utility Commission's "Blue Book" proposal (Order Instituting Rulemaking on the Commission's Proposed Policies Governing Restructuring California's Electric Services Industry and Reforming Regulation, R. 94-04-031; Order Instituting Investigation on the Commission's Proposed Policies Governing Restructuring California's Electric Services Industry and Reforming Regulation, I. 94-04-032) and the Michigan Public Service Commission's proposal (Interim Order on Experimental Retail Wheeling Program, Case No. U-10143/U-10176 (April 11, 1994)).

[137] Energy Information Administration, *Performance Issues for a Changing Electric Power Industry* (January 1995) 10 and (Figure 5).

online producing almost 7,800 MW of power.[138] In addition, the cost of utility-generated electricity differs widely across the major regions of

[33,070]

the United States. Average utility rates range from 3 to 5 cents in the Northwest to 9 to 11 cents in California.[139] Electricity consumers are demanding access to lower cost supplies available in other regions of the United States, and access to the newer, lower cost generation resources. It is also important that the non-traditional generators of cheaper power be able to gain access to the transmission grid on a non-discriminatory open access basis.

The Commission's goal is to ensure that customers have the benefits of competitively priced generation. However, we must do so without abandoning our traditional obligation to ensure that utilities have a fair opportunity to recover prudently incurred costs and that they maintain power supply reliability. As well, the benefits of competition should not come at the expense of other customers. The Commission believes that requiring utilities to provide non-discriminatory open access transmission tariffs, while simultaneously resolving the extremely difficult issue of recovery of transition costs (discussed *infra*), is the key to reconciling these competing demands.

Non-discriminatory open access to transmission services is critical to the full development of competitive wholesale generation markets and the lower consumer prices achievable through such competition.[140] Transmitting utilities own the

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138 Current Competition, November 199_[?], Vol. 5, No. 8, at p. 8.

139 *See* map attached as Appendix A. This Appendix will not appear in the Federal Register.

140 As discussed above, only a minimal number of public utilities have any form of an "open access" tariff on file with the Commission and no

transportation system over which bulk power competition occurs and transmission service continues to be a natural monopoly. Denials of access (whether they are blatant or subtle), and the potential for future denials of access, require the Commission to revisit and reform its regulation of transmission in interstate commerce. Such action is required by the FPA's mandate that the Commission remedy undue discrimination.

1. Market Power

Unlike new generating capacity (*see* prior discussion of *KCP&L*), transmission remains and is expected to remain a natural monopoly. The Commission has addressed the natural monopoly character of transmission in the major cases summarized above and in the Commission's recent Transmission Pricing Policy Statement. The monopoly characteristic exists in part because entry into the transmission market is restricted or difficult.[141] In addition, as unit costs are less for larger lines and networks, transmission facilities still exhibit scale economies. From an economic, environmental, and aesthetic viewpoint, it is often better for a single owner (or group of owners) to build a single large transmission line rather than for many transmission owners to build smaller parallel lines on a non-coordinated basis.

Further, effective competition among owners of parallel transmission lines is unlikely, and often impossible, with existing practices and technology. For example, on an

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public utility has on file a non-discriminatory open access tariff as defined by this rule.

[141] An example of this is that, except in the limited case of licensed hydroelectric projects under Part I of the FPA, there is no Federal right of eminent domain available to assist in acquiring rights of way for new transmission lines. In addition, the regulatory requirements to build a transmission line vary from state to state. In all states, new transmission lines is getting harder.

alternating current (AC) electric system, electricity flows on parallel paths based on the impedance of each path. With two electric systems providing parallel contract paths, a share of the actual power flows would occur on each system according to the physical characteristics of the system. Thus, each of the two transmission service providers would have the incentive to underbid the other because the winner would receive all of the transmission revenues, but only incur a fraction of the costs. The loser, on the other hand, would incur the remaining costs, but would receive no revenues.

In today's electric industry, which is dominated by vertically integrated utilities, an owner or controller of transmission service can exclude generation competitors from the market, thereby favoring the transmission owner's own generation. This can occur through outright

[33,071]

denial of transmission access, or, as is more likely, through access that is discriminatory as to rates, terms or conditions of service.[142] Thus, in the absence of non-discriminatory open access tariffs, the development of fully competitive bulk power markets cannot occur, and consumers will be deprived of the benefits that would be expected from such a competitive market.

2. Discriminatory Access

Some transmission-owning utilities have voluntarily begun to offer unbundled transmission tariff services to third-party suppliers and purchasers of wholesale power, though none have done so to the extent proposed by this proposed rule.[143] However, because utilities are naturally profit

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[142] *See, e.g.*, David W. Penn, A Municipal Perspective on Electric Transmission Access Questions, Pub. Util. Fort.18-19 (Feb. 6, 1986).

[143] The majority have offered only point-to-point services. However, a few utilities have sought to comply with the non-discrimination (comparability) standard announced in *AEP*. For example, Kansas City

maximizers and monopoly suppliers to their native load, the vast majority of transmission-owning utilities have not agreed to give up their market power voluntarily. Transmission-owning utilities have an incentive to deny access either by not filing *any* open access tariff or by filing a tariff that offers services inferior to those used by the transmission owner. This is particularly true for those utilities that emerged from the recent decades of technological and legal changes as high-cost generation companies. Open access transmission places their existing generation at risk because their wholesale customers may seek alternative lower price suppliers. It is in their self-interest to maintain and use market power to retain (or expand) market share for their existing generation facilities, at least until they can get their generation costs in line with current market prices. Because generating units are usually depreciated over a 30- to 50-year physical life, many high cost companies may attempt to exercise transmission market power for decades to preserve the value of past generation investments.

Unless all public utilities are required to provide non-discriminatory open access transmission, the ability to achieve full wholesale power competition, and resulting consumer benefits, will be jeopardized. If utilities are allowed to discriminate in favor of their own generation resources at the expense of providing access to others' lower cost generation resources by not providing open access on fair terms, the transmission grid will be a patchwork of open access transmission systems, systems with bilaterally negotiated arrangements, and systems with transmission ordered under section 211. Under such a patchwork of transmission systems, sellers will not have access to

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Power & Light Company (KCP&L) and Louisville Gas & Electric Company (LG&E) recently filed settlements to this effect. *KCP&L*, Docket No. ER94-1045 (settlement filed February 14, 1995) and *LG&E*, Docket No. ER94-1380 (settlement filed February 10, 1995).

transmission on an equal basis, and some sellers will benefit at the expense of others. The ultimate loser in such a regime is the consumer.

A patchwork of transmission systems will also result in inefficiencies across the Nation's transmission grids. Because of the physical properties of the transmission system, electric power moves over parallel transmission lines from generator to load, without regard to whether a line is part of a system providing open access or not.[144] However, today the industry develops transmission contracts as if power flowed along one series of lines belonging to specific owners, which is called the "contract path." Thus, transmission users will search for contract paths through open access systems to take advantage of the non-discriminatory open

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access tariffs. Because open access transmission tariffs include an obligation to expand when necessary to accommodate third-party requirements for service, transmitting companies offering open access services across

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[144] In *Indiana Michigan Power Company*, 64 FERC ¶ 61,184 (1993), the Commission explained loop flows and parallel power flows:

> In general, utilities transact with one another based on a contract path concept. For pricing purposes, parties assume that power flows are confined to a specified sequence of interconnected utilities that are located on a designated contract path. However, in reality power flows are rarely confined to a designated contract path. Rather, power flows over multiple parallel paths that may be owned by several utilities that are not on the contract path. The actual power flow is controlled by the laws of physics which cause power being transmitted from one utility to another to travel along multiple parallel paths and divide itself among those paths along the lines of least resistance. This parallel path flow is sometimes called "loop flow."

Id. at p. 62,545.

their systems could end up constructing a disproportionate share of new transmission facilities.

Expansion cannot be efficient under such a patchwork of open access transmission systems. Not only would this misallocate cost burdens to open access companies, but it is unlikely that the optimal transmission development will always be within their service territories. Expansion on closed systems, instead of open systems, may in some cases be the more efficient way to relieve constraints. Thus, a patchwork of open access systems will not result in the least cost expansion of the Nation's transmission grids. In addition, states with open access utilities may refuse to site new lines if their closed access neighbors are not doing their share.[145]

A discriminatory, patchwork system also works against pricing parallel power flows on a sensible regional basis. The formation of effective regional transmission groups, which the Commission strongly encourages, would be fostered if all utilities in a region offered non-discriminatory open access.[146] In fact, optimal cooperative regional action would involve all transmission systems in the region offering non-discriminatory open access to all wholesale customers.

A transmission-owning utility may deny access to third parties not only to avoid losing its own generation sales, but also to maintain other trading gains. For example, a company can buy low cost power for its own use from a

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[145] The Commission partially addressed this concern by allowing reciprocity provisions in open access transmission tariffs. *See, e.g., Southwestern Electric Power Company and Public Service Company of Oklahoma*, 65 FERC ¶ 61,212 at p. 61,981-82 (1993), *order on reh'g.* 66 FERC ¶ 61,099 (1994).

[146] While the Commission has conditioned its approval of RTGs to achieve this same result, the formation of RTGs is voluntary. By contrast, compliance with the final rules adopted in this proceeding will be required.

neighbor at a low price if other buyers cannot reach that neighbor to bid up the price. Furthermore, if it does not need the energy, it can market that power by buying low and selling high.

In the past, transmission-owning utilities have discriminated against others seeking transmission access. Transmission-owning utilities have denied access by outright refusals to deal. While such actions tend to be rare, likely because transmission owners fear they may trigger antitrust action,[147] they have occurred.[148] More often, however, discrimination is likely to be manifested more subtly and indirectly.[149] One such way would be for transmission owners to adopt a negotiating strategy that involves a sequence of informational and other requirements over a protracted period of time. By the time all of the requirements are finally satisfied, the window for the customer's trade

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147 *See, e.g.*, Penn, *supra* note 142, at p. 18

148 Otter Tail Power Company refused to wheel power for the village of Elbow Lake. The Supreme Court ultimately ruled against Otter Tail on antitrust grounds. *Otter Tail Power Company*, 410 U.S. 366 (1974). The Commission has also found that Utah Power & Light Company consistently refused to permit the wheeling of low-cost power across its system in order to use its strategically located bottleneck transmission system to extract monopoly prices. *Utah Power & Light Company, supra*, 45 FERC at p. 61,287 and n.137 (1988). O.

149 *See, e.g.*, Penn, *supra* note 142, at p. 18-19 (discussion of methods used to deny access). Penn also noted in his 1986 article that the American Public Power Association had conducted a survey of its members in which about 25% indicated a problem in securing transmission in effecting coordination services and about an equal amount had reported being denied transmission access in the recent past. Id. at p. 18. *See also Pacific Gas & Electric Company*, 51 FPC 1030, 1031-32, *reh'g denied*, 51 FPC 1543 (1974) (parties alleged that public utility proposed "a wholesale rate so high that its wholesale customers would be unable to compete with PG&E for large industrial retail loads" and entered into restrictive and anticompetitive contracts that strengthened public utility's monopoly).

opportunity has closed.[150] Another way of frustrating access is to substantially change the terms

[33,073]

of negotiated agreements through protracted delay, including filings with regulatory agencies.[151]

Another way for transmission-owning utilities to frustrate access and competition is to allow access, but only on non-comparable or unsupportable terms and conditions that are inferior to the conditions under which the transmission owners themselves use or could use the transmission grid or on terms and conditions that have no operational or financial basis. Discrimination can be exercised this way in the following areas:

(1) *Network Service.* Network service allows a transmission customer to distribute a given amount of transmission usage between specified resources and specified loads without having to pay multiple charges for each resource-load pairing. Transmission owners can refuse to

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[150] Members of the Coalition for a Competitive Electricity Market alleged that they have encountered this strategy. Coalition Petition at p. 13, n. 19.

[151] An example of this tactic is evident in the history of Pacific Gas and Electric Company's (PG&E) attempt to avoid its commitments made to the California owners of the California-Oregon Transmission Project (COTP). The owners had originally planned the COTP to have its southern terminus at the Midway station with Southern California Edison. PG&E convinced them to terminate the project instead at PG&E's Tesla station and indicated that PG&E would provide transmission service the rest of the way south to Midway. PG&E promised this service in 1989 (in what came to be known as the South of Tesla Principles). PG&E spent the next four years filing substitute provisions for what it had promised in the Principles. See Pacific Gas and Electric Company, 65 FERC ¶ 61,312 at p. 62,428-30 and n.22, *remanded on other grounds, Pacific Gas & Electric Company v. FERC*, No. 94-70037 (9th Cir. June 23, 1994) (unpublished opinion), *order on remand*, 69 FERC ¶ 61,006 (1994).

provide service on these terms and instead insist on charges that are a function of the number of resource load pairings.[152] This can dramatically increase the cost of such service. Such treatment does not reflect the way transmission owners' costs are allocated to their own native load customers.

(2) *Pricing.* Transmission service can be made unattractive to third-party customers by pricing such service on a basis that is different from that used by the transmission owner and that results in higher rates. One example would be charging third-party customers distance-sensitive rates, while pricing all similar transmission bundled with power services on a postage stamp basis.[153]

(3) *Service Priority.* The priority of transmission service is a critical service factor. The transmission provider could disadvantage third-party transmission customers by making firm transmission service to them subordinate to the transmission utility's native load service.[154]

(4) *Scheduling and Balancing Provisions.* A transmission owner could hold transmission customers to unnecessarily long lead times to change power schedules. In some cases, scheduling could be required as much as a month

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[152] *See Pacific Gas and Electric Company*, 52 FERC ¶ 61,347 at p. 62,375-76 (1990) (proposal to charge a base demand and a flexibility adder for an integrating transmission service). PG&E eventually withdrew the proposal. 56 FERC ¶ 61, 373 at p. 62,429 (1991); *see also Florida Municipal Power Agency v. Florida Power & Light Company*, 65 FERC ¶ 61,125 (1993) (Federal Municipal Power Agency requested a section 211 order directing network service); *Tex-La Electric Cooperative of Texas*, 67 FERC ¶ 61,019 at p. 61,057 (1994) (Tex-La requested a section 211 order directing network service).

[153] *See* notes 129 and 130, *supra; see also Tex-La Electric Cooperative of Texas*, 69 FERC ¶ 61,269 at p. 62,034-35 (1994), in which the Commission found this practice to be unduly discriminatory.

[154] *See AEP*, 64 FERC at p. 62,971-72.

ahead of time.[155] This precludes transmission customers from using their service for short-term trading. Transmitting utilities may also insist that customers keep strict adherence to scheduling and balancing provisions by requiring them to get back on schedule quickly or face stiff penalties.[156] One example of a stiff penalty for failure to schedule sufficient power would be to assess shortfalls based on a partial requirements rate with an 11-month ratchet.[157] In contrast, transmitting utilities may have access to less costly balancing alternatives, such as substituting resources without notice or borrowing capacity from neighboring utilities and settling

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the imbalance by returning energy in-kind within a much longer time period than allowed to customers.[158]

(5) *Use of Firm Transmission Capacity.* Transmission owners can unnecessarily restrict the firm transmission capacity made available to transmission customers. One way to restrict service would be to prohibit the customer from reassigning such capacity when it is not needed.[159] This restricts the customer's ability to manage the risk of long-term capacity purchases and to compete as a seller in the transmission service market. Another example would be that the transmission owner could restrict a customer's use of

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155 *Id.*

156 *See* Coalition Petition at p. 20-21.

157 *See Borough of Zelienople*, 70 FERC ¶ 61,073 at p. 61,184 (1995) (load exceeding schedule by 1 MW would be filled at a partial requirements rate using 60% demand ratchet for 11 months, *i.e.*, 1 MW times 60% times $9.30 per kW times 11, for a total of $61,380).

158 *See* Coalition Petition at p. 20-21.

159 *See, e.g., Pacific Gas and Electric Company*, 53 FERC ¶ 61,145 at p. 61,505 (1990) (utility proposed a reassignment prohibition on the use of Reserve Transmission Service available to the Sacramento Municipal Utility District under a proposed Interconnection Agreement).

transmission capacity by allowing sales only from the customer's generating resources that are temporarily in excess of actual load needs.[160] Transmission owners do not face these restrictions in their own use of transmission capacity.

(6) *Ancillary Services.* A transmitting utility may offer to a transmission customer ancillary services (*e.g.*, scheduling) that are inferior to the services it provides for itself. Transmission owners may be free to choose whether to supply some of these services to themselves or contract for them if available more cheaply elsewhere.[161] Third-party transmission customers do not always have this option on a comparable basis.

(7) *Creditworthiness and Security Deposits.* Customers are sometimes required to make onerous deposits in order to obtain service.[162]

(8) *Reciprocity Double Payments.* Transmission agreements often require reciprocity. Non-transmission owners could be required to contract with, and pay, third-party transmitting utilities to provide the required reciprocal service.[163] Transmission owners do not face such obstacles in using their own systems.

Finally, an additional way for transmission-owning utilities to frustrate access and competition is by granting

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160 *Id.* at p. 61,504-05 (utility proposed an export restriction on the use of Reserve Transmission Service available to the Sacramento Municipal Utility District under a proposed Interconnection Agreement).

161 *See* Coalition Petition at p. 28-29 and 32.

162 For example, it is reported that one customer was told that a $13 million line of credit would be required to ensure creditworthiness for a request of only one MW of transmission capacity for a coordination trade. See Coalition Petition at p. 30.

163 *See* Coalition Petition at p. 25; *see also AES Power, Inc.*, 69 FERC ¶ 61,345 at p. 62,295 and 62, 301 (1994) (AES).

each other superior rights and lower rates—compared to those available to non-transmission owning customers—in pools, interconnection agreements, and other protocols.[164] For example, pool-wide transmission service can be made available to members at rates less than those that each member would separately propose under traditional rate methods. This could disadvantage non-transmission owners if pool membership is restricted or if it requires excessive or vaguely stated transmission contributions that could be difficult to meet.[165]

Section 211 is not always a sufficient remedy for this discriminatory behavior. Third parties may seek non-discriminatory transmission under section 211, but they will not be able to compete if the sale or purchase opportunity is gone before a final order can be obtained under section 211. This could be the case in many situations because of the procedural requirements of sections 211 and 212.[166] Indeed, to date, the Commission has received eighteen section 211 transmission requests,[167-168] which it has tried to process

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expeditiously within the procedural constraints contained in sections 211 and 212. As to the seven requests that have received a final order, the average elapsed time from date of

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[164] *See* Coalition Petition at p. 13-14.

[165] *See Mid-Continent Area Power Pool*, 69 FERC ¶ 61,347 at p. 62, 308 (1994).

[166] For example, an applicant must make a request for transmission service to the transmitting utility at least 60 days before filing an application with the Commission for an order to provide transmission. The Commission must first issue a proposed order and allow the parties a reasonable time to negotiate agreeable terms and conditions before it can issue a final order. Moreover, a final order faces possible rehearing and a court appeal.

[167-168] One request was withdrawn.

filing to the date of a final order was 9 months. The remaining ten requests have been pending, on average, more than 6 months.

The following sets forth the status of the section 211 cases filed with the Commission:

Docket No.	Date of application	Status	Months pending
TX93-1 ..	01/19/93	Final Order-7/29/93	6
TX93-2 ..	06/18/93	Final Order-7/1/94	12
TX93-3 ..	06/30/93	Withdrew-9/10/93	2
TX93-4 ..	07/02/93	Final Order-5/11/94	10
TX94-1 ..	10/21/93	Final Order-7/6/94	9
TX94-2 ..	11/04/93	Pending[a]	16
TX94-3 ..	11/09/93	Final Order-7/13/94	8
TX94-4 ..	12/15/93	Final Order-12/1/94	11
TX94-5 ..	04/15/94	Final Order-3/23/95	11
TX94-6 ..	07/05/94	Pending	8
TX94-7 ..	07/15/94	Pending[a]	8
TX94-8 ..	08/05/94	Pending	7
TX94-9 ..	09/09/94	Pending[a]	6
TX94-10 ..	09/16/94	Pending	6
TX95-1 ..	10/11/94	Pending	5
TX95-2 ..	10/17/94	Pending	5
TX95-3 ..	01/19/95	Pending	2
TX95-4 ..	01/24/95	Pending	2

[a] A proposed order has been issued.

As the wholesale power markets become more competitive, delayed access becomes a matter of increasing concern. Not only have long-term purchases from non-traditional generators become more important, but short-term firm and non-firm power sales and purchases create significant profit or cost-saving opportunities for utilities, marketers, and their customers. As a result, market participants are exploring various ways to reduce their costs through trading. These include poolcos, changes to existing pools, short-term trading

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systems, and futures contracts.[169] We do not see how such options will work unless all parties have non-discriminatory transmission access rights and hour-to-hour access without having to go through a regulatory proceeding for each trade.

In today's emerging competitive wholesale power markets, the practices of some transmission-owning utilities are unduly discriminatory and anticompetitive. These practices produce market distortions today, undermine the goal of the Energy Policy Act to create competitive bulk power markets, and will continue if this Commission does not take action. Most important, they can harm consumers by denying them the benefits of competitively priced power. We seek additional specific examples of such practices.

3. Analogies to the Natural Gas Industry

The electric industry today is analogous in many ways to the natural gas industry before the Commission issued Order Nos. 436 and 636.[170] Then, natural gas pipelines were primarily merchants offering a bundled sales service, which provided gas to customers at the city-gate from the pipelines' own system supplies. In addition, pipelines moved a

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[169] We note that NEPOOL and MAPP are currently exploring ways to modify their pool structures to accommodate competitive power markets. As noted in the Pooling Notice of Inquiry, *supra*, the poolco concept basically involves an independent entity that would control the operation of all transmission facilities and some or all generating facilities in a region. It would be open and would provide transmission service to all generators. Thus, the poolco would create a spot market for power in the region.

[170] Order No. 436, *Regulation of Natural Gas Pipelines After Partial Wellhead Decontrol, FERC Regulations Preambles* ¶ 30,665 (1985); Order 636, *Pipeline Service Obligations and Revisions to Regulations Governing Self-Implementing Transportation Under Part 284 of the Commission's Regulations; and Regulation of Natural Gas Pipelines After Partial Wellhead Decontrol*, 57 FR 13267 (April 16, 1992), FERC Statutes and Regulations ¶ 30,939 (Order No. 636), *appeal pending*.

relatively small amount of third-party gas under a separate transportation service. To meet their sales service obligations, pipelines purchased most of their system supply from third-party producers under long-term contracts. In the early 1980s, due to changing market conditions, the prices under many of these contracts ended up being higher than those available in the then evolving spot market. Because of the long-term contracts and the resulting higher cost gas, system supply gas tended to be more costly than gas that the customers could buy in the competitive spot market. At the same time, the transportation service bundled with a pipeline's sales service was usually superior to the transportation service third parties could obtain. Essentially, the pipeline would provide itself service that had much greater flexibility and often promised greater reliability than that available to third-party shippers. Pipelines had a considerable incentive to maintain this difference in transportation service quality to make their own, more expensive gas more attractive.

A similar situation exists today in the electric industry. Traditional public utilities deliver bundled service—generation and transmission—to most of their wholesale customers. They have monopoly control over transmission facilities and thus control access to their customers. The lack of non-discriminatory access to transmission services raises the same general concerns that were prevalent in the gas industry. Accordingly, unless similar regulatory measures are undertaken, the Commission expects the same type of discriminatory and anticompetitive behavior will continue in the electric industry as was present in the gas industry, because denying non-discriminatory access will continue to be in the economic self-interest of transmission monopolists, absent regulatory changes.[171]

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[171] *See AGD, supra*, 824 F.2d at p. 1008 ("Agencies do not need to conduct experiments in order to rely on the prediction that an unsupported stone will fall."). The ongoing discriminatory behavior by

In its regulation of interstate pipelines under the Natural Gas Act (NGA) the Commission initially addressed the problem of undue discrimination in Order No. 436, finding natural gas pipeline practices to be unduly discriminatory under

[33,077]

the NGA[172] and effectuating "open access" transportation. The Commission in that order sought to make transportation available to third parties on a non-discriminatory basis. The Commission provided that, if a pipeline held itself out as a transporter of gas for others, it must provide that service to all shippers without discrimination. At the same time, the Commission allowed pipelines and their customers to retain the traditional bundled sales and transportation services under existing certificate authority.

As a result of Order No. 436, pipelines became primarily transporters of natural gas. However, in Order No. 636, the Commission noted that pipelines were still providing, albeit at a reduced level, a bundled, city gate, sales service in competition with third-party sales and transportation, and concluded that the competition was not occurring on an equal basis. The Commission also noted that pipelines' natural gas sales prices exceeded those of their competitors, much as electric utilities' embedded costs can exceed the cost of new generating capacity and excess generating capacity of others. In this regard, the Commission determined that the transportation service bundled with pipelines' sales service was superior to that made available to third parties and that pipelines and unregulated competitors were not selling the

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owners or controllers of transmission in the electric industry is detailed *supra*.

[172] In this regard, sections 4 and 5 of the NGA are virtually identical to sections 205 and 206 of the FPA.

same product.[173] Accordingly, in Order No. 636, the Commission found this behavior anticompetitive and required pipelines to "unbundle" their sales services from their transportation services and to provide open access transportation service that is equal in quality for all gas supplies whether purchased from the pipeline or some other supplier.[174]

Our experience in the gas area influences our decision that, at a minimum, functional unbundling of wholesale services is necessary in order to obtain non-discriminatory open access and to avoid anticompetitive behavior in wholesale electricity markets.

4. Coordination Rates

In finding a need for non-discriminatory open access transmission, the Commission has considered the structure of the coordination market, *i.e.*, the market for wholesale sales to a public utility's non-requirements customers. Utilities now engage in coordination trades primarily under rates no lower than the seller's variable cost and no higher than that variable cost plus 100% contribution to the fixed costs of the production unit used to price energy and the relevant transmission facilities. This rate flexibility allows the buyer and seller to negotiate a price reflecting the market at the time of the sale, including the number of buyers and sellers, the relative incremental and decremental variable costs, and the amount of savings attainable by transacting. Thus, while the seller's ceiling rate reflects some measure of fixed and variable costs, the actual transaction price is set, to a certain

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[173] Order No. 636 at p. 30,402. The Commission explained that pipelines were selling a regulated bundled sales and transportation service, but that their competitors were generally selling only the gas commodity. The Commission also recognized that pipelines were at a competitive disadvantage due to their certificate and contractual obligations to their firm sales customers. *Id.* at p. 30,403.

[174] Order No. 636 at p. 30,393-94.

extent, by the marketplace. This marketplace, however, may be skewed by the general lack of transmission access, and the resulting price may be considerably above prices in a fully competitive market.

Some utilities transact under a split-savings rate that generally sets the price halfway between the seller's incremental variable cost and the buyer's decremental variable cost. Here again, price is a function of the alternatives reachable through the transmission grid at the time of the transaction. This rate form is primarily used today to distribute the savings derived from the central dispatch of power pools on an after-the-fact basis.

The Commission believes that unless the participants in coordination markets mitigate their transmission market power, market-driven prices for coordination trades may no longer be just and reasonable. Thus, our preliminary conclusion is that current coordination pricing is no longer justified in the absence of a tariff offer of non-discriminatory open access transmission services by the seller (owning or controlling transmission) in a

[33,078]

coordination transaction.[175] The Commission's past practice of allowing such pricing for coordination trades appears to be inconsistent with emerging competitive markets unless those who benefit from such trading offer access to other, lower-priced trading opportunities. We seek comments on this issue.

E. The Proposed Regulations

The goals of the proposed regulations are two-fold: (1) to facilitate the development of competitive wholesale bulk power markets by ensuring that wholesale purchasers of

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[175] As discussed *infra*, sellers must also meet the Commission's other requirements to obtain market-based rates.

electric energy and wholesale sellers of electricity can reach each other by eliminating anticompetitive practices and undue discrimination in transmission services; and (2) to address the transition costs associated with the development of competitive wholesale markets. This section addresses the elimination of undue discrimination. Transition costs are addressed below in Section F.

Non-discriminatory open access transmission is critical to the ability of sellers to compete on a fair basis and the ability of purchasers to reach the lowest priced generation options. Thus far, the Commission has developed an open access comparability requirement on a case-by-case basis. We have directed our administrative law judges, to whom the various cases have been referred, to examine the factual circumstances surrounding a utility's use of its own system *vis-a-vis* the type of service provided to third parties. Nonetheless, it has now become evident to us that it is necessary for the Commission to define the parameters of a non-discriminatory open access tariff much more precisely.

Until now, we have been applying the new standard of what constitutes undue discrimination only to new voluntary tariff filings. We now no longer believe it is appropriate to apply this standard so narrowly; therefore, we are proposing to require all public utilities to offer non-discriminatory open access services in accord with the proposed rule and the attached tariffs. This broad application is consistent with our determination that undue discrimination by jurisdictional public utilities must be prevented or remedied. It is also consistent with our desire to bring further efficiencies to the provision of electric service by encouraging competitive bulk power markets.

1. Non-discriminatory Open Access Tariff Requirement

Transmission owners can discriminate by restricting access to, or restricting expansion of, transmission facilities, or by restricting access to the ancillary services that control

the generation resources on the transmission grid.[176] To ensure that all participants in wholesale electricity markets have non-discriminatory open access to the transmission network, transmission owners must offer non-discriminatory open access transmission and ancillary services to wholesale sellers and purchasers of electric energy in interstate commerce.[177] This will require tariffs that offer point-to-point and network transmission services, including ancillary services. All of these services must be non-discriminatory as to price as well as to non-price terms and conditions. Services must be available to any entity that could obtain transmission services under section 211.

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In our *AEP* rehearing order and in several subsequent cases,[178] we set for hearing the following issues:

1. The different uses that a transmission owner

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[176] Examples of ancillary services (which include control area services) are: scheduling service between control areas, and various services that facilitate power movements within control areas, *e.g.*, dispatch service, load following service, imbalance resolution service, reactive power support, and operating reserves. We invite comment on definitions of these terms and their component parts. Regardless, the proposed rule would require that all ancillary services be offered on a non-discriminatory basis.

[177] *See generally* William W. Hogan, Reshaping the Electricity Industry, Prepared for the Federal Energy Bar Conference, "Turmoil for the Utilities," 5 Washington, D.C. (Nov. 17, 1994):

> Commercial functions must facilitate non-discriminatory, comparable open access and support market operations in the competitive sectors. The EPAct requirements and the FERC implementation emphasize the need to obtain market access under terms and conditions that support competition. Everyone should have equal access to and use of essential facilities, particularly transmission, with the rights of ownership limited to compensation consistent with opportunity costs in a competitive market.

[178] *See, e.g.*, AEP, 67 FERC at p. 61,491.

makes of its transmission system and whether there are any operational differences between any particular use that the owner makes of the system and the use third parties might need, and in particular, the degree of flexibility the transmission owner accords itself in using its transmission system for different purposes.

2. Any potential impediments or consequences to providing a particular service to third-party transmission customers which is the same or comparable to service that the transmission owner provides itself.

3. The costs that the transmission owner incurs in providing transmission associated with its use of the system, and whether the costs to provide such service or comparable service to third parties would be different.

Based on what we have learned in the past year, the Commission proposes to address these issues generically. Concurrently with this order, the Commission is issuing a separate order on how a final rule would apply to pending cases.[179] We believe that the parties and the administrative law judges in the individual pending proceedings should continue their efforts, but in doing so should take into account the principles announced in this proposed rule. This will permit any fine tuning of the broader principles announced here and set forth in the *pro forma* tariffs that may be necessary to recognize the individual circumstances of particular systems.

With regard to the first issue, the Commission believes that all utilities use their own systems in two basic ways: to

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[179] Order Providing Guidance Concerning Pending and Future Proceedings involving Non-discriminatory Open Access Transmission Services, Docket Nos. ER93-540-000, *et. al.*

provide themselves point-to-point transmission service that supports coordination sales, and to provide themselves network transmission service that supports the economic dispatch of their own generation units and purchased power resources (integrating their resources to meet their internal loads).[180] This network transmission service is bundled as part of retail service and as part of wholesale requirements service, and is the fundamental support of a utility's dispatch that underlies its trading in the wholesale coordination market.[181]

The Commission has preliminarily concluded that third parties may need one or both of these basic uses in order to obtain competitively priced generation or to have the opportunity to be competitive sellers of power. The Commission therefore proposes that all public utilities must offer both firm and non-firm point-to-point transmission service and firm network transmission service on a non-discriminatory open access basis in accord with the proposed rule and the attached tariffs. The Commission believes that a utility's tariff must offer to provide any point-to-point transmission service and network transmission service that customers need, even though the utility may not provide itself the specific service requested. For example, a utility

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[180] While there may be any number of specific services used by a particular customer, we have concluded, after analyzing the historical types of transmission service tariffs on file, as well as the tariffs filed in the ongoing comparability proceedings, that all transmission services generally fall within these two categories.

[181] A utility's own coordination purchases may involve hourly scheduled transfers of fixed blocks of power. These schedules are supported by the utility's own network transmission service used for its economic dispatch. Consequently, network service is covered by the proposed rule because it supports a utility's coordination purchases, regardless of whether or not the utility has any requirements customers that also would use network service.

may not provide itself "wheeling-through" service,[182] which is a specific form of point-to-point service. However, because "wheeling-through" service is merely a subset of basic point-to-point service, which the utility does provide to itself,

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the Commission will require a utility to provide such service.[183] Similarly, a utility may contend that it does not provide non-firm point-to-point service to itself because all of its transmission investment results in firm entitlements. Nonetheless, the utility provides itself with the functional equivalent of non-firm service when it uses, subject to curtailment or interruption, capacity that is temporarily unused by other firm reservation holders. Therefore, it must offer non-firm point-to-point service.

We will not allow transmission providers to define terms or specify transmission uses to erect barriers to fair and equal competition in power markets, or to engage in undue discrimination.

On the second issue set for hearing in *AEP, et al.* (potential impediments to providing a particular service), we believe there are none, except for impediments to siting. However, any impediments to siting are the same whether the utility is providing service to itself or to a third party.

On the third issue set for hearing *AEP, et al.* (the costs of providing comparable service), we believe there is no difference in the costs incurred by a transmission provider in providing transmission to itself or to a third party. Thus, the

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[182] "Wheeling through" refers to transmittal of electric energy through a transmitting utility's grid, *i.e.*, entering at one point of interconnection and leaving at another.

[183] This would be true of other services as well.

transmission owner must charge itself and third parties the same rates for the use of its system.

All electricity trade is supported and facilitated in one way or another by ancillary services, and transmission services may be comprised of many different combinations of ancillary services. Therefore, the Commission will require that such ancillary services be offered separately through open access tariffs. These are discussed in detail *infra*.

Public utilities that are transmission-only companies or transcos, *i.e.*, companies that do not own or control generation, do not use their own transmission systems to sell their own power. However, a public utility transco would be required to offer open access transmission services as well as ancillary services. It would also have to provide a real-time information network, as discussed below. The Commission is also announcing certain quality-of-service guidelines to aid in evaluating the quality of transmission service that must be provided by public utilities. These are described *infra* and are reflected in proposed *pro forma* point-to-point and network tariffs attached to this notice of proposed rulemaking. Our preliminary conclusion is that the provisions contained in the *pro forma* tariffs are the minimum provisions necessary to meet the requirement of non-discriminatory open access. We seek comments on these tariffs.

2. Implementing Non-discriminatory Open Access: Function-al Unbundling

The Commission's preliminary view is that functional unbundling of wholesale services is necessary to implement non-discriminatory open access. Accordingly, the proposed rule requires that a public utility's uses of its own transmission system for the purpose of engaging in wholesale sales and purchases of electric energy must be separated from other activities, and that transmission services (including ancillary services) must be taken under the filed transmission

tariff of general applicability. The proposed rule does not require corporate unbundling (selling off assets to a non-affiliate, or establishing a separate corporate affiliate to manage a utility's transmission assets) in any form, although some utilities may ultimately choose such a course of action. The proposed rule accommodates corporate unbundling, but does not require it.

Functional unbundling means three things. First, it means that a public utility must take transmission services (including ancillary services) for all of its new wholesale sales and purchases of energy under the same tariff of general applicability under which others take service. New wholesale sales and purchases are those under any contracts executed on or after the open access tariffs required by this proposed rule become effective. Non-discriminatory service requires that the utility charge itself the same price for these services that it charges its third-party wholesale transmission customers. We seek comment as to the appropriate means to enforce this requirement, such as a revenue crediting mechanism.

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Second, functional unbundling means that a transmission owner must include in its open access tariffs separately stated rates for the transmission and ancillary service components of each transmission service it provides.[184] The rates must satisfy the Commission's Transmission Pricing Policy Statement. Third, functional unbundling means that the public utility, in order to provide non-discriminatory open access to transmission and ancillary services information,

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[184] This means that a customer who buys both generation and transmission services from the utility will have a separately stated rate for the generation, transmission, and ancillary services that it purchases. The rates for transmission and ancillary services would be stated in the open access tariff. The rates for the generation service would be under a separate rate schedule.

must rely upon the same electronic network that its transmission customers rely upon to obtain transmission information about its system when buying or selling power.

For example, the proposed rule requires that a public utility unbundle its new wholesale requirements service contracts, and its new wholesale coordination purchase transactions, and take the firm network transmission component of those services under its own firm network transmission tariff. Similarly, the proposed rule requires that a public utility unbundle any new wholesale coordination sales transactions and take the point-to-point transmission component of that service under its own point-to-point transmission tariff. Finally, the proposed rule requires that a utility unbundle ancillary services and take these services under its network and point-to-point tariffs.

Public utilities also must authorize their power pool agents to offer any transmission service available under power pool arrangements to all transmission customers. In addition, public utilities that participate in a power pool that acts as a control area must authorize the power pool's control center to offer ancillary services under a filed tariff, and must take all of their control area services from that tariff.[185] A public utility must take dispatch service and other ancillary transmission services on the same terms and conditions as those offered to its transmission customers.[186]

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[185] Similarly, public utilities that own transmission, but get their ancillary services from another entity must authorize that entity to provide ancillary services under a filed tariff and must take their ancillary services from that tariff.

[186] The Commission recognizes that the proposal here overlaps with the pending Pooling Notice of Inquiry. However, the fundamental non-discrimination requirements of the FPA, and therefore the basic requirements of the proposed rule, must be applied to power pools in which public utilities participate. This issue is discussed further in the Implementation Section *infra*.

The requirement to provide ancillary services and to take those services under a tariff is not intended to mandate any federal rules that would prescribe the actual merit order of dispatch. Rather, it is a requirement that public utilities ensure that dispatch practices and procedures applicable to them are also applied to third-party transmission customers.

The proposed requirement that a public utility take transmission service used for wholesale requirements service and wholesale coordination transactions under its own filed tariff means that all wholesale trade, both that of the public utility and its competitors, would be taken under a single wholesale transmission tariff. Our preliminary view is that such a requirement places the correct incentives on the public utility to file a fair tariff since it must live under those terms for wholesale purposes. The Commission invites comment on its approach to functional unbundling. Will it provide strong enough incentives for non-discriminatory access without some form of corporate restructuring? If utilities restructure, how will our proposed rules apply to different types of corporate structures?

While this approach to unbundling creates good incentives with respect to wholesale service, it omits retail service. In other words, it does not require the transmission owner to take unbundled transmission service under the same tariff as third parties in order to serve its retail customers. This will result in service under two separate arrangements—an explicit wholesale transmission tariff filed at the Commission and an implicit retail transmission tariff governed by a state regulatory body. It also raises the possibility that the quality of transmission service for retail purposes will be superior to

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the quality of transmission service offered for wholesale purposes.

We seek comment on how this bifurcated approach would affect the public utility's incentives to provide non-discriminatory open access wholesale transmission service. For example, will planning of incremental transmission facilities be comparable or will the transmission provider's retail customers retain an advantage from having expansion costs placed on third parties? What would be the benefits of an approach that required the transmission provider to take unbundled transmission service for both wholesale and retail purposes under the same tariff used by third-party transmission customers? Is such an approach necessary to ensure that all participants have the same incentives to achieve non-discriminatory open access transmission service and competitive power markets? What would be the disadvantages, if any, of such an approach?

The Commission recognizes that the unbundling of transmission for retail purposes would intrude upon matters that state commissions have traditionally regulated. One possible approach that would unify service standards for wholesale and retail service would be for each vertically integrated utility to establish a distribution function that would be responsible for obtaining transmission service on behalf of retail customers. This distribution function then could be treated just as any other wholesale customer. The distribution function of the utility would take service under the single Commission filed tariff. This could change the traditional approach of state-federal allocation of transmission costs. The Commission seeks comment on the merits of such an approach. How could the Commission cooperate with state commissions if it were to adopt such an approach?

Finally, we address a specific type of retail service that we believe to be "bundled" retail service in name only: a so-called "buy-sell" transaction in which an *end user* arranges for the purchase of generation from a third-party supplier and a public utility transmits that energy in interstate commerce

and re-sells it as part of a "bundled" retail sale to the end user. We have determined that in these types of transactions the retail "bundled" sale is actually the functional equivalent of two unbundled retail sales: (1) a voluntary sale of unbundled transmission at retail in interstate commerce, subject to our exclusive jurisdiction;[187] and (2) a sale of unbundled generation at retail, subject to the state's jurisdiction.[188] For these types of sales, public utilities will have to provide the voluntary retail transmission component of the sale under a FERC-filed tariff consistent with the substantive requirements of this proposed rule.

We are aware that some public utilities are already contemplating initiating this type of "buy-sell" service. Similar services occurred in the natural gas area, but the Commission did not address the jurisdictional issue until a substantial number of transactions had been negotiated and implemented. When the Commission ultimately addressed the natural gas buy-sell programs, we concluded that we have jurisdiction over buy-sell transactions since such agreements utilize interstate transportation.[189] We were concerned then, just as we are concerned now, that interstate and intrastate programs operate together in an appropriately integrated way.[190] It is our preliminary view that the interstate transmission aspect of the buy-sell program must take place under a FERC-filed tariff.

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[187] As discussed *infra*, there would be a component of local distribution in such a transaction, subject to the state's jurisdiction.

[188] This determination is consistent with our findings regarding similar types of transactions in the natural gas area. *See El Paso Natural Gas Company*, 59 FERC ¶ 61,031 (1992), *dismissed sub nom. Windward Energy and Marketing Company v. FERC*, No. 92-1208 (D.C. Feb. 2, 1994).

[189] *Id.*

[190] 56 FERC ¶ 61,289 at p. 62,133 (1991).

In imposing this requirement we wish to stress that the state has jurisdiction to determine which group of retail customers may participate in such a program. We also recognize that state regulatory commissions will be called upon to determine whether they have jurisdiction under state law over retail wheeling or direct access programs and, if so, whether to authorize such programs.[191] However, the

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rates, terms, and conditions for the interstate transmission aspects of the program are jurisdictional to this Commission.

The Commission did not address this jurisdictional issue at an early state in the evolution of competition in the natural gas market. Consequently, when we finally acted we chose to grandfather ongoing programs so that energy supply arrangements would not be disrupted.[192] We do not want to face that difficulty again. Thus, we are addressing the issue at an early stage so that public utilities and their customers will be on notice of the jurisdictional implications of their actions, and can make plans accordingly.

3. Real-time Information Networks

With this proposed rule, the Commission is issuing a Notice of Technical Conference and Request for Comments on a proposal to require that public utilities provide all transmission users, including the transmission owner or controller, simultaneous access to transmission and ancillary services information through real-time information networks that would operate under industry-wide standards. Based upon the lessons we have learned from our experience with

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191 This Commission does not have authority to order retail wheeling. Section 212(h) of the Federal Power Act, as amended by the Energy Policy Act of 1992, Pub. L. No. 102-486, 106 Stat. 2776.

192 59 FERC ¶ 61,031 (1992); *reh'g denied*, 60 FERC ¶ 61,117 (1992).

gas pipeline EBBs, we believe the proposed approach is necessary and can work.

4. Non-discriminatory Open Access Tariff Provisions

It is important that the tariffs filed to meet the non-discriminatory open access service requirement contain terms and conditions necessary to ensure a certain minimum level of service quality and to provide a level of certainty to both customers and transmission service providers as to procedures and obligations. The discussion in this section is intended to give guidance about our proposed non-discriminatory open access requirements. The terms and conditions discussed here are reflected in the *pro forma* tariffs in Appendices B and C.[193]

We note at the outset two basic principles proposed to be used when evaluating tariff terms. First, the terms and conditions governing service should be clear and specific. Vague or general tariff terms introduce uncertainty, controversy and delay. In many situations, delaying access or increasing the transaction cost of access is, for all practical purposes, denying access. Second, any restrictions or limitations on service or procedures must be limited to technical or operational needs that can be verified, and they must be the least restrictive way to meet those needs.[194]

The Commission invites comment on the terms and conditions proposed as well as whether others may be necessary.

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193 These Appendices will not appear in the Federal Register.

194 However, as discussed *infra*, in determining the level of capacity that must be made available for new transmission service requests, we have proposed that capacity needed to meet current and reasonably forecasted native load and to meet existing contractual obligations may be excluded from capacity made available for new transmission service requests.

a. *Customer eligibility.* A non-discriminatory open-access tariff must be available to any entity that can request transmission services under section 211.[195]

b. *Expansion obligation.* A public utility must offer to enlarge its transmission capacity (or expand its ancillary service facilities) if necessary to provide transmission services. This provision is necessary to mitigate the utility's transmission market power that could be exercised by restricting capacity. The customer must agree to reasonable terms, conditions and prices, including the financial responsibility for its share of the incremental expansion costs.[196]

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The Commission recognizes that a utility may not be able to enlarge transmission capacity because it cannot obtain the necessary approvals or property rights under applicable Federal, state and local laws. If the utility has failed after making and documenting a good faith effort to obtain the necessary approvals or property rights, it can request to be relieved of its expansion obligation by an appropriate filing at the Commission.[197] This will result in consistent treatment under FPA sections 205 and 206 and FPA section 211.

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[195] Under Section 211, any electric utility, Federal power marketing agency, or any other person generating electric energy for sale for resale may request transmission services under section 211.

[196] *See, e.g., Northeast Utilities Service Company*, 56 FERC ¶ 61,269 at p. 62,202 (1991), *order on reh'g*, 58 FERC ¶ 61,070, *reh'g denied*, 59 FERC ¶ 61,042 (1992), *remanded*, 993 F.2d 937 (1st Cir. 1993), *order on remand*, 66 FERC ¶ 61,332 (1994) (*Northeast Utilities*) (wheeling customer must provide reasonable financial assurance before the public utility undertakes substantial investments in new facilities for that customer).

[197] However, we have previously noted that a utility may bear a heavy burden in demonstrating that it cannot enlarge its transmission capacity to

c. *Service obligation.* The transmission tariff must offer non-discriminatory transmission services (including related ancillary services that the utility can provide) to eligible transmission customers. For example, a tariff should make available both flexible (*i.e.*, firm and non-firm) point-to-point transmission service and network transmission service, as well as those ancillary services necessary to accomplish such transmission services.

(1) Network Transmission Service. Network transmission service allows a transmission customer to use the entire transmission network to provide generation service for specified resources and specified loads without having to pay a separate charge for each resource-load pairing. Such service allows a transmission customer to integrate, plan, commit, economically dispatch, and regulate its resources to serve its consolidated load. Network service provides the customer with the same flexible network usage needed to optimize its resources to meet its customers' needs that transmission owners have to optimize their resources to meet their customers' needs. Network service includes the ability to import power from other control areas to economically and reliably serve the customers' load. Non-discrimination requires that network service be made available in an open access tariff.

Network service would be valuable to customers such as municipals, cooperatives, and municipal joint action agencies that supply the long-term firm power needs of members with multiple loads that are wholly or partly within a single transmission system. Indeed, network service is essential for the resource integration that is needed for efficient operation. For example, a generation and transmission cooperative whose generating facilities and member cooperatives are widely dispersed may not own all of the transmission

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meet a new transmission request. *See Northeast Utilities*, 58 FERC at p. 61, 209.

facilities needed to link the generators with the members' distribution systems. In this case, the cooperative must rely on a transmission-owning utility to provide network service. Without such service, the cooperative would have difficulty supplying reliable, efficient power to its own members.

(2) Flexible Point-to-Point Service

The second required service in a non-discriminatory open access tariff is point-to-point transmission service. Both firm and non-firm service must be available on a point-to-point basis. Under firm point-to-point service, the transmission owner would provide firm deliveries of power from designated points of receipt to designated points of delivery. Each point of receipt would be set forth in a service agreement along with a corresponding capacity reservation for that point of receipt. Each point of delivery would be set forth in the service agreement along with a corresponding capacity reservation for that point of delivery. The greater of (1) the sum of the capacity reservations at the point(s) of receipt, or (2) the sum of the capacity reservations at the point(s) of delivery would be the firm capacity reservation for which the transmission customer would be charged.

However, firm point-to-point service must have the same flexibility in use as that available to the transmission provider and obligate the transmission provider to supply non-firm transmission service, if available, over non-designated receipt and delivery points (or over designated receipt and delivery points in excess of its firm reservation at those points) without incurring any additional charges (or executing a new service agreement) so long as the customer's use does not exceed its total firm capacity reservation. Any use by a customer in excess of its firm capacity reservation at each point of receipt or point of delivery will be

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on an as-available basis and will be treated as non-firm service. A customer may also request non-firm point-to-point transmission service on a stand-alone basis.

Transmission customers may be willing to trade off the higher risk of interruption with non-firm service for the lower non-firm transmission rate. Customers should be able to make that choice, which will depend on their own balancing of the risk of transmission service interruption with the interruptibility of, and trade gains associated with, the power resource. It is important that the customer, not the transmission provider, make this choice. The tariff should not restrict non-firm transmission service to the transporting of only non-firm power transactions.[198]

Tariffs should offer flexible point-to-point transmission service for transactions that involve power flows into, out of, within or through the control areas. Whether or not a transmission provider actually undertakes such specific services on its own behalf, it has the flexibility to do so. Therefore, if service to third parties is to be non-discriminatory, they, too, must have such flexibility. In addition, tariff restrictions on receipt and delivery points should not preclude particular types of transactions. For example, a transmission provider should not limit receipt and delivery points to points of interconnection with other transmission systems because such a restriction may preclude transactions that originate or terminate with generation or particular loads within a transmission provider's control area.

(3) Ancillary Services. Ancillary services are those services necessary to support the transmission of electric power from seller to purchaser given the obligations of control areas and transmitting utilities within those control areas to maintain reliable operations of the interconnected

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[198] See Entergy Services, Inc., 58 FERC ¶ 61,234 at p. 61,767, order on reh'g, 60 FERC ¶ 61,168 (1992), rev'd on other grounds sub nom.

transmission system. Basic transmission service without ancillary services may be of little or no value to prospective customers. A variety of ancillary services is needed in conjunction with providing basic transmission service to a customer. These services range from actions taken to effect the transaction (such as scheduling and dispatching services) to services that are necessary to maintain the integrity of the transmission system (such as load following, reactive power support, and system protection services). Other ancillary services are needed to correct for the effects associated with undertaking a transaction (such as loss compensation and energy imbalance services). Due to the nature of certain ancillary services (such as scheduling and dispatching service), the transmission provider may be uniquely positioned to provide these services. However, for other ancillary services (such as loss compensation service), the customer may wish to provide the service itself or purchase the service from a party other than the transmission owner or its agent.

If the transmission provider provides the ancillary services for its own use of the transmission system, the public utility should offer in the tariff to provide ancillary services for transmission customers. Tariffs should commit to provide specific ancillary services at specific prices or under specific compensation methods that are clearly described.

If the transmission provider obtains ancillary services from a third party, *e.g.*, does not operate its own control area or obtains ancillary services from a pool, the transmission provider should offer in the tariff to secure ancillary services for transmission customers from that third party. Examples of such third-party arrangements may include a public utility obtaining ancillary services from a power pool or from a control area operator.

Based on our experience to date, we propose that the following ancillary services should be offered in the tariff:

1. Reactive Power/Voltage Control Service

In order to maintain transmission voltages on the transmission provider's transmission facilities within acceptable limits, transmission facilities and some or all generation facilities (in the service area where the transmission provider's transmission facilities are located) are operated to produce (or absorb) reactive

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APPENDIX G

Statutory Provisions

APPENDIX G

STATUTORY PROVISIONS

[15 U.S.C. § 717]

§ 717. Regulation of natural gas companies

(a) Necessity of regulation in public interest

As disclosed in reports of the Federal Trade Commission made pursuant to S.Res. 83 (Seventieth Congress, first session) and other reports made pursuant to the authority of Congress, it is declared that the business of transporting and selling natural gas for ultimate distribution to the public is affected with a public interest, and that Federal regulation in matters relating to the transportation of natural gas and the sale thereof in interstate and foreign commerce is necessary in the public interest.

(b) Transactions to which provisions of chapter applicable

The provisions of this chapter shall apply to the transportation of natural gas in interstate commerce, to the sale in interstate commerce of natural gas for resale for ultimate public consumption for domestic, commercial, industrial, or any other use, and to natural-gas companies engaged in such transportation or sale, but shall not apply to any other transportation or sale of natural gas or to the local distribution of natural gas or to the facilities used for such distribution or to the production or gathering of natural gas.

(c) Intrastate transactions exempt from provisions of chapter; certification from State commission as conclusive evidence

The provisions of this chapter shall not apply to any person engaged in or legally authorized to engage in the transportation in interstate commerce or the sale in interstate commerce for resale, of natural gas received by such person

from another person within or at the boundary of a State if all the natural gas so received is ultimately consumed within such State, or to any facilities used by such person for such transportation or sale, provided that the rates and service of such person and facilities be subject to regulation by a State commission. The matters exempted from the provisions of this chapter by this subsection are declared to be matters primarily of local concern and subject to regulation by the several States. A certification from such State commission to the Federal Power Commission that such State commission has regulatory jurisdiction over rates and service of such person and facilities and is exercising such jurisdiction shall constitute conclusive evidence of such regulatory power or jurisdiction.

(d) Vehicular natural gas jurisdiction

The provisions of this chapter shall not apply to any person solely by reason of, or with respect to, any sale or transportation of vehicular natural gas if such person is--

(1) not otherwise a natural-gas company; or

(2) subject primarily to regulation by a State commission, whether or not such State commission has, or is exercising, jurisdiction over the sale, sale for resale, or transportation of vehicular natural gas.

[15 U.S.C. § 717c]

§ 717c. Rates and charges

(a) Just and reasonable rates and charges

All rates and charges made, demanded, or received by any natural-gas company for or in connection with the transportation or sale of natural gas subject to the jurisdiction of the Commission, and all rules and regulations affecting or pertaining to such rates or charges, shall be just and reasonable, and any such rate or charge that is not just and reasonable is declared to be unlawful.

(b) Undue preferences and unreasonable rates and charges prohibited

No natural-gas company shall, with respect to any transportation or sale of natural gas subject to the jurisdiction of the Commission, (1) make or grant any undue preference or advantage to any person or subject any person to any undue prejudice or disadvantage, or (2) maintain any unreasonable difference in rates, charges, service, facilities, or in any other respect, either as between localities or as between classes of service.

(c) Filing of rates and charges with Commission; public inspection of schedules

Under such rules and regulations as the Commission may prescribe, every natural-gas company shall file with the Commission, within such time (not less than sixty days from June 21, 1938) and in such form as the Commission may designate, and shall keep open in convenient form and place for public inspection, schedules showing all rates and charges for any transportation or sale subject to the jurisdiction of the Commission, and the classifications, practices, and regulations affecting such rates and charges, together with all contracts which in any manner affect or relate to such rates, charges, classifications, and services.

(d) Changes in rates and charges; notice to Commission

Unless the Commission otherwise orders, no change shall be made by any natural-gas company in any such rate, charge, classification, or service, or in any rule, regulation, or contract relating thereto, except after thirty days' notice to the Commission and to the public. Such notice shall be given by filing with the Commission and keeping open for public inspection new schedules stating plainly the change or changes to be made in the schedule or schedules then in force and the time when the change or changes will go into effect. The Commission, for good cause shown, may allow changes to take effect without requiring the thirty days' notice herein provided for by an order specifying the changes so to be made and the time when they shall take effect and the manner in which they shall be filed and published.

(e) Authority of Commission to hold hearings concerning new schedule of rates

Whenever any such new schedule is filed the Commission shall have authority, either upon complaint of any State, municipality, State commission, or gas distributing company, or upon its own initiative without complaint, at once, and if it so orders, without answer or formal pleading by the natural-gas company, but upon reasonable notice, to enter upon a hearing concerning the lawfulness of such rate, charge, classification, or service; and, pending such hearing and the decision thereon, the Commission, upon filing with such schedules and delivering to the natural-gas company affected thereby a statement in writing of its reasons for such suspension, may suspend the operation of such schedule and defer the use of such rate, charge, classification, or service, but not for a longer period than five months beyond the time when it would otherwise go into effect; and after full hearings, either completed before or after the rate, charge, classification, or service goes into effect, the Commission may make such orders with reference thereto as would be proper in a proceeding initiated after it had become effective.

If the proceeding has not been concluded and an order made at the expiration of the suspension period, on motion of the natural-gas company making the filing, the proposed change of rate, charge, classification, or service shall go into effect. Where increased rates or charges are thus made effective, the Commission may, by order, require the natural-gas company to furnish a bond, to be approved by the Commission, to refund any amounts ordered by the Commission, to keep accurate accounts in detail of all amounts received by reason of such increase, specifying by whom and in whose behalf such amounts were paid, and, upon completion of the hearing and decision, to order such natural-gas company to refund, with interest, the portion of such increased rates or charges by its decision found not justified. At any hearing involving a rate or charge sought to be increased, the burden of proof to show that the increased rate or charge is just and reasonable shall be upon the natural-gas company, and the Commission shall give to the hearing and decision of such questions preference over other questions pending before it and decide the same as speedily as possible.

[15 U.S.C. 717d]

§ 717d. Fixing rates and charges; determination of cost of production or transportation

(a) Decreases in rates

Whenever the Commission, after a hearing had upon its own motion or upon complaint of any State, municipality, State commission, or gas distributing company, shall find that any rate, charge, or classification demanded, observed, charged, or collected by any natural-gas company in connection with any transportation or sale of natural gas, subject to the jurisdiction of the Commission, or that any rule, regulation, practice, or contract affecting such rate, charge, or classification is unjust, unreasonable, unduly discriminatory, or preferential, the Commission shall determine the just and reasonable rate, charge, classification, rule, regulation, practice, or contract to be thereafter observed and in force, and shall fix the same by order: Provided, however, That the Commission shall have no power to order any increase in any rate contained in the currently effective schedule of such natural gas company on file with the Commission, unless such increase is in accordance with a new schedule filed by such natural gas company; but the Commission may order a decrease where existing rates are unjust, unduly discriminatory, preferential, otherwise unlawful, or are not the lowest reasonable rates.

(b) Costs of production and transportation

The Commission upon its own motion, or upon the request of any State commission, whenever it can do so without prejudice to the efficient and proper conduct of its affairs, may investigate and determine the cost of the production or transportation of natural gas by a natural-gas company in cases where the Commission has no authority to

establish a rate governing the transportation or sale of such natural gas.

[16 U.S.C. § 824]

§ 824. Declaration of policy; application of subchapter

(a) Federal regulation of transmission and sale of electric energy

It is declared that the business of transmitting and selling electric energy for ultimate distribution to the public is affected with a public interest, and that Federal regulation of matters relating to generation to the extent provided in this subchapter and subchapter III of this chapter and of that part of such business which consists of the transmission of electric energy in interstate commerce and the sale of such energy at wholesale in interstate commerce is necessary in the public interest, such Federal regulation, however, to extend only to those matters which are not subject to regulation by the States.

(b) Use or sale of electric energy in interstate commerce

(1) The provisions of this subchapter shall apply to the transmission of electric energy in interstate commerce and to the sale of electric energy at wholesale in interstate commerce, but except as provided in paragraph (2) shall not apply to any other sale of electric energy or deprive a State or State commission of its lawful authority now exercised over the exportation of hydroelectric energy which is transmitted across a State line. The Commission shall have jurisdiction over all facilities for such transmission or sale of electric energy, but shall not have jurisdiction, except as specifically provided in this subchapter and subchapter III of this chapter, over facilities used for the generation of electric energy or over facilities used in local distribution or only for the transmission of electric energy in intrastate commerce, or over facilities for the transmission of electric energy consumed wholly by the transmitter.

(2) The provisions of sections 824i, 824j, and 824k of this title shall apply to the entities described in such provisions, and such entities shall be subject to the jurisdiction of the Commission for purposes of carrying out such provisions and for purposes of applying the enforcement authorities of this chapter with respect to such provisions. Compliance with any order of the Commission under the provisions of section 824i or 824j of this title, shall not make an electric utility or other entity subject to the jurisdiction of the Commission for any purposes other than the purposes specified in the preceding sentence.

(c) Electric energy in interstate commerce

For the purpose of this subchapter, electric energy shall be held to be transmitted in interstate commerce if transmitted from a State and consumed at any point outside thereof; but only insofar as such transmission takes place within the United States.

(d) "Sale of electric energy at wholesale" defined

The term "sale of electric energy at wholesale" when used in this subchapter, means a sale of electric energy to any person for resale.

(e) "Public utility" defined

The term "public utility" when used in this subchapter and subchapter III of this chapter means any person who owns or operates facilities subject to the jurisdiction of the Commission under this subchapter (other than facilities subject to such jurisdiction solely by reason of section 824i, 824j, or 824k of this title).

(f) United States, State, political subdivision of State, or agency or instrumentality thereof exempt

No provision in this subchapter shall apply to, or be deemed to include, the United States, a State or any political subdivision of a State, or any agency, authority, or

instrumentality of any one or more of the foregoing, or any corporation which is wholly owned, directly or indirectly, by any one or more of the foregoing, or any officer, agent, or employee of any of the foregoing acting as such in the course of his official duty, unless such provision makes specific reference thereto.

(g) Books and records

(1) Upon written order of a State commission, a State commission may examine the books, accounts, memoranda, contracts, and records of--

(A) an electric utility company subject to its regulatory authority under State law,

(B) any exempt wholesale generator selling energy at wholesale to such electric utility, and

(C) any electric utility company, or holding company thereof, which is an associate company or affiliate of an exempt wholesale generator which sells electric energy to an electric utility company referred to in subparagraph (A),

wherever located, if such examination is required for the effective discharge of the State commission's regulatory responsibilities affecting the provision of electric service.

(2) Where a State commission issues an order pursuant to paragraph (1), the State commission shall not publicly disclose trade secrets or sensitive commercial information.

(3) Any United States district court located in the State in which the State commission referred to in paragraph (1) is located shall have jurisdiction to enforce compliance with this subsection.

(4) Nothing in this section shall--

(A) preempt applicable State law concerning the provision of records and other information; or

(B) in any way limit rights to obtain records and other information under Federal law, contracts, or otherwise.

(5) As used in this subsection the terms "affiliate", "associate company", "electric utility company", "holding company", "subsidiary company", and "exempt wholesale generator" shall have the same meaning as when used in the Public Utility Holding Company Act of 1935 [15 U.S.C.A. § 79 et seq.].

[16 U.S.C. § 824d]

§ 824d. Rates and charges; schedules; suspension of new rates; automatic adjustment clauses

(a) Just and reasonable rates

All rates and charges made, demanded, or received by any public utility for or in connection with the transmission or sale of electric energy subject to the jurisdiction of the Commission, and all rules and regulations affecting or pertaining to such rates or charges shall be just and reasonable, and any such rate or charge that is not just and reasonable is hereby declared to be unlawful.

(b) Preference or advantage unlawful

No public utility shall, with respect to any transmission or sale subject to the jurisdiction of the Commission, (1) make or grant any undue preference or advantage to any person or subject any person to any undue prejudice or disadvantage, or (2) maintain any unreasonable difference in rates, charges, service, facilities, or in any other respect, either as between localities or as between classes of service.

(c) Schedules

Under such rules and regulations as the Commission may prescribe, every public utility shall file with the Commission, within such time and in such form as the Commission may designate, and shall keep open in convenient form and place for public inspection schedules showing all rates and charges for any transmission or sale subject to the jurisdiction of the Commission, and the classifications, practices, and regulations affecting such rates and charges, together with all contracts which in any manner affect or relate to such rates, charges, classifications, and services.

(d) Notice required for rate changes

Unless the Commission otherwise orders, no change shall be made by any public utility in any such rate, charge, classification, or service, or in any rule, regulation, or contract relating thereto, except after sixty days' notice to the Commission and to the public. Such notice shall be given by filing with the Commission and keeping open for public inspection new schedules stating plainly the change or changes to be made in the schedule or schedules then in force and the time when the change or changes will go into effect. The Commission, for good cause shown, may allow changes to take effect without requiring the sixty days' notice herein provided for by an order specifying the changes so to be made and the time when they shall take effect and the manner in which they shall be filed and published.

(e) Suspension of new rates; hearings; five-month period

Whenever any such new schedule is filed the Commission shall have authority, either upon complaint or upon its own initiative without complaint, at once, and, if it so orders, without answer or formal pleading by the public utility, but upon reasonable notice, to enter upon a hearing concerning the lawfulness of such rate, charge, classification, or service; and, pending such hearing and the decision thereon, the Commission, upon filing with such schedules and delivering to the public utility affected thereby a statement in writing of its reasons for such suspension, may suspend the operation of such schedule and defer the use of such rate, charge, classification, or service, but not for a longer period than five months beyond the time when it would otherwise go into effect; and after full hearings, either completed before or after the rate, charge, classification, or service goes into effect, the Commission may make such orders with reference thereto as would be proper in a proceeding initiated after it had become effective. If the proceeding has not been concluded and an order made at the expiration of such five months, the proposed change of rate, charge, classification, or service shall go into effect at the end

of such period, but in case of a proposed increased rate or charge, the Commission may by order require the interested public utility or public utilities to keep accurate account in detail of all amounts received by reason of such increase, specifying by whom and in whose behalf such amounts are paid, and upon completion of the hearing and decision may by further order require such public utility or public utilities to refund, with interest, to the persons in whose behalf such amounts were paid, such portion of such increased rates or charges as by its decision shall be found not justified. At any hearing involving a rate or charge sought to be increased, the burden of proof to show that the increased rate or charge is just and reasonable shall be upon the public utility, and the Commission shall give to the hearing and decision of such questions preference over other questions pending before it and decide the same as speedily as possible.

(f) Review of automatic adjustment clauses and public utility practices; action by Commission; "automatic adjustment clause" defined

(1) Not later than 2 years after November 9, 1978 and not less often than every 4 years thereafter, the Commission shall make a thorough review of automatic adjustment clauses in public utility rate schedules to examine—

(A) whether or not each such clause effectively provides incentives for efficient use of resources (including economical purchase and use of fuel and electric energy), and

(B) whether any such clause reflects any costs other than costs which are—

(i) subject to periodic fluctuations and

(ii) not susceptible to precise determinations in rate cases prior to the time such costs are incurred.

Such review may take place in individual rate proceedings or in generic or other separate proceedings applicable to one or more utilities.

(2) Not less frequently than every 2 years, in rate proceedings or in generic or other separate proceedings, the Commission shall review, with respect to each public utility, practices under any automatic adjustment clauses of such utility to insure efficient use of resources (including economical purchase and use of fuel and electric energy) under such clauses.

(3) The Commission may, on its own motion or upon complaint, after an opportunity for an evidentiary hearing, order a public utility to

(A) modify the terms and provisions of any automatic adjustment clause, or

(B) cease any practice in connection with the clause,

if such clause or practice does not result in the economical purchase and use of fuel, electric energy, or other items, the cost of which is included in any rate schedule under an automatic adjustment clause.

(4) As used in this subsection, the term "automatic adjustment clause" means a provision of a rate schedule which provides for increases or decreases (or both), without prior hearing, in rates reflecting increases or decreases (or both) in costs incurred by an electric utility. Such term does not include any rate which takes effect subject to refund and subject to a later determination of the appropriate amount of such rate.

[16 U.S.C. § 824e]

§ 824e. Power of Commission to fix rates and charges; determination of cost of production or transmission

(a) Unjust or preferential rates, etc.; statement of reasons for changes; hearing; specification of issues

Whenever the Commission, after a hearing had upon its own motion or upon complaint, shall find that any rate, charge, or classification, demanded, observed, charged, or collected by any public utility for any transmission or sale subject to the jurisdiction of the Commission, or that any rule, regulation, practice, or contract affecting such rate, charge, or classification is unjust, unreasonable, unduly discriminatory or preferential, the Commission shall determine the just and reasonable rate, charge, classification, rule, regulation, practice, or contract to be thereafter observed and in force, and shall fix the same by order. Any complaint or motion of the Commission to initiate a proceeding under this section shall state the change or changes to be made in the rate, charge, classification, rule, regulation, practice, or contract then in force, and the reasons for any proposed change or changes therein. If, after review of any motion or complaint and answer, the Commission shall decide to hold a hearing, it shall fix by order the time and place of such hearing and shall specify the issues to be adjudicated.

(b) Refund effective date; preferential proceedings; statement of reasons for delay; burden of proof; scope of refund order; refund orders in cases of dilatory behavior; interest

Whenever the Commission institutes a proceeding under this section, the Commission shall establish a refund effective date. In the case of a proceeding instituted on complaint, the refund effective date shall not be earlier than

the date 60 days after the filing of such complaint nor later than 5 months after the expiration of such 60-day period. In the case of a proceeding instituted by the Commission on its own motion, the refund effective date shall not be earlier than the date 60 days after the publication by the Commission of notice of its intention to initiate such proceeding nor later than 5 months after the expiration of such 60-day period. Upon institution of a proceeding under this section, the Commission shall give to the decision of such proceeding the same preference as provided under section 824d of this title and otherwise act as speedily as possible. If no final decision is rendered by the refund effective date or by the conclusion of the 180-day period commencing upon initiation of a proceeding pursuant to this section, whichever is earlier, the Commission shall state the reasons why it has failed to do so and shall state its best estimate as to when it reasonably expects to make such decision. In any proceeding under this section, the burden of proof to show that any rate, charge, classification, rule, regulation, practice, or contract is unjust, unreasonable, unduly discriminatory, or preferential shall be upon the Commission or the complainant. At the conclusion of any proceeding under this section, the Commission may order the public utility to make refunds of any amounts paid, for the period subsequent to the refund effective date through a date fifteen months after such refund effective date, in excess of those which would have been paid under the just and reasonable rate, charge, classification, rule, regulation, practice, or contract which the Commission orders to be thereafter observed and in force: Provided, That if the proceeding is not concluded within fifteen months after the refund effective date and if the Commission determines at the conclusion of the proceeding that the proceeding was not resolved within the fifteen-month period primarily because of dilatory behavior by the public utility, the Commission may order refunds of any or all amounts paid for the period subsequent to the refund effective date and prior to the conclusion of the proceeding. The refunds shall be made,

with interest, to those persons who have paid those rates or charges which are the subject of the proceeding.

(c) Refund considerations; shifting costs; reduction in revenues; "electric utility companies" and "registered holding company" defined

Notwithstanding subsection (b) of this section, in a proceeding commenced under this section involving two or more electric utility companies of a registered holding company, refunds which might otherwise be payable under subsection (b) of this section shall not be ordered to the extent that such refunds would result from any portion of a Commission order that (1) requires a decrease in system production or transmission costs to be paid by one or more of such electric companies; and (2) is based upon a determination that the amount of such decrease should be paid through an increase in the costs to be paid by other electric utility companies of such registered holding company: Provided, That refunds, in whole or in part, may be ordered by the Commission if it determines that the registered holding company would not experience any reduction in revenues which results from an inability of an electric utility company of the holding company to recover such increase in costs for the period between the refund effective date and the effective date of the Commission's order. For purposes of this subsection, the terms "electric utility companies" and "registered holding company" shall have the same meanings as provided in the Public Utility Holding Company Act of 1935, as amended [15 U.S.C.A. § 79 et seq.].

(d) Investigation of costs

The Commission upon its own motion, or upon the request of any State commission whenever it can do so without prejudice to the efficient and proper conduct of its affairs, may investigate and determine the cost of the production or transmission of electric energy by means of

facilities under the jurisdiction of the Commission in cases where the Commission has no authority to establish a rate governing the sale of such energy.

[16 U.S.C. § 824j]

§ 824j. Wheeling authority

(a) Transmission service by any electric utility; notice, hearing and findings by Commission

Any electric utility, Federal power marketing agency, or any other person generating electric energy for sale for resale, may apply to the Commission for an order under this subsection requiring a transmitting utility to provide transmission services (including any enlargement of transmission capacity necessary to provide such services) to the applicant. Upon receipt of such application, after public notice and notice to each affected State regulatory authority, each affected electric utility, and each affected Federal power marketing agency, and after affording an opportunity for an evidentiary hearing, the Commission may issue such order if it finds that such order meets the requirements of section 824k of this title, and would otherwise be in the public interest. No order may be issued under this subsection unless the applicant has made a request for transmission services to the transmitting utility that would be the subject of such order at least 60 days prior to its filing of an application for such order.

(b) Reliability of electric service

No order may be issued under this section or section 824i of this title if, after giving consideration to consistently applied regional or national reliability standards, guidelines, or criteria, the Commission finds that such order would unreasonably impair the continued reliability of electric systems affected by the order.

(c) Replacement of electric energy

(1) Repealed. Pub.L. 102-486, Title VII, § 721(4)(A), Oct. 24, 1992, 106 Stat. 2915

(2) No order may be issued under subsection (a) or (b) of this section which requires the transmitting utility subject to the order to transmit, during any period, an amount of electric energy which replaces any amount of electric energy--

(A) required to be provided to such applicant pursuant to a contract during such period, or

(B) currently provided to the applicant by the utility subject to the order pursuant to a rate schedule on file during such period with the Commission: Provided, That nothing in this subparagraph shall prevent an application for an order hereunder to be filed prior to termination of [FN1] modification of an existing rate schedule: Provided, That such order shall not become effective until termination of such rate schedule or the modification becomes effective.

(3), (4) Repealed. Pub.L. 102-486, Title VII, § 721(4)(C), Oct. 24, 1992, 106 Stat. 2915

(d) Termination or modification of order; notice, hearing and findings of Commission; contents of order; inclusion in order of terms and conditions agreed upon by parties

(1) Any transmitting utility ordered under subsection (a) or (b) of this section to provide transmission services may apply to the Commission for an order permitting such transmitting utility to cease providing all, or any portion of, such services. After public notice, notice to each affected State regulatory authority, each affected Federal power marketing agency, each affected transmitting utility, and each affected electric utility, and after an opportunity for an evidentiary hearing, the Commission shall issue an order terminating or modifying the order issued under subsection (a) or (b) of this section, if the electric utility providing such transmission services has demonstrated, and the Commission has found, that--

(A) due to changed circumstances, the requirements applicable, under this section and section 824k of this title, to the issuance of an order under subsection (a) or (b) of this section are no longer met, or

(B) any transmission capacity of the utility providing transmission services under such order which was, at the time such order was issued, in excess of the capacity necessary to serve its own customers is no longer in excess of the capacity necessary for such purposes, or

(C) the ordered transmission services require enlargement of transmission capacity and the transmitting utility subject to the order has failed, after making a good faith effort, to obtain the necessary approvals or property rights under applicable Federal, State, and local laws.

No order shall be issued under this subsection pursuant to a finding under subparagraph (A) unless the Commission finds that such order is in the public interest.

(2) Any order issued under this subsection terminating or modifying an order issued under subsection (a) or (b) of this section shall--

(A) provide for any appropriate compensation, and

(B) provide the affected electric utilities adequate opportunity and time to--

(i) make suitable alternative arrangements for any transmission services terminated or modified, and

(ii) insure that the interests of ratepayers of such utilities are adequately protected.

(3) No order may be issued under this subsection terminating or modifying any order issued under subsection (a) or (b) of this section if the order under subsection (a) or (b) of this section includes terms and conditions agreed upon by the parties which--

(A) fix a period during which transmission services are to be provided under the order under subsection (a) or (b) of this section, or

(B) otherwise provide procedures or methods for terminating or modifying such order (including, if appropriate, the return of the transmission capacity when necessary to take into account an increase, after the issuance of such order, in the needs of the transmitting utility subject to such order for transmission capacity).

(e) "Facilities" defined

As used in this section, the term "facilities" means only facilities used for the generation or transmission of electric energy.

[16 U.S.C. § 824k]

§ 824k. Orders requiring interconnection or wheeling

(a) Rates, charges, terms, and conditions for wholesale transmission services

An order under section 824j of this title shall require the transmitting utility subject to the order to provide wholesale transmission services at rates, charges, terms, and conditions which permit the recovery by such utility of all the costs incurred in connection with the transmission services and necessary associated services, including, but not limited to, an appropriate share, if any, of legitimate, verifiable and economic costs, including taking into account any benefits to the transmission system of providing the transmission service, and the costs of any enlargement of transmission facilities. Such rates, charges, terms, and conditions shall promote the economically efficient transmission and generation of electricity and shall be just and reasonable, and not unduly discriminatory or preferential. Rates, charges, terms, and conditions for transmission services provided pursuant to an order under section 824j of this title shall ensure that, to the extent practicable, costs incurred in providing the wholesale transmission services, and properly allocable to the provision of such services, are recovered from the applicant for such order and not from a transmitting utility's existing wholesale, retail, and transmission customers.

(b) Repealed. Pub.L. 102-486, Title VII, §722(1), Oct. 24, 1992, 106 Stat. 2916

(c) Issuance of proposed order; agreement by parties to terms and conditions of order; approval by Commission; inclusion in final order; failure to agree

(1) Before issuing an order under section 824i of this title or subsection (a) or (b) of section 824j of this title,

the Commission shall issue a proposed order and set a reasonable time for parties to the proposed interconnection or transmission order to agree to terms and conditions under which such order is to be carried out, including the apportionment of costs between them and the compensation or reimbursement reasonably due to any of them. Such proposed order shall not be reviewable or enforceable in any court. The time set for such parties to agree to such terms and conditions may be shortened if the Commission determines that delay would jeopardize the attainment of the purposes of any proposed order. Any terms and conditions agreed to by the parties shall be subject to the approval of the Commission.

(2) (A) If the parties agree as provided in paragraph (1) within the time set by the Commission and the Commission approves such agreement, the terms and conditions shall be included in the final order. In the case of an order under section 824i of this title, if the parties fail to agree within the time set by the Commission or if the Commission does not approve any such agreement, the Commission shall prescribe such terms and conditions and include such terms and conditions in the final order.

(B) In the case of any order applied for under section 824j of this title, if the parties fail to agree within the time set by the Commission, the Commission shall prescribe such terms and conditions in the final order.

(d) Statement of reasons for denial

If the Commission does not issue any order applied for under section 824i or 824j of this title, the Commission shall, by order, deny such application and state the reasons for such denial.

(e) Savings provisions

(1) No provision of section 824i, 824j, 824m of this title, or this section shall be treated as requiring any person to utilize the authority of any such section in lieu of any other authority of law. Except as provided in section 824i, 824j, 824m of this title, or this section, such sections shall not be construed as limiting or impairing any authority of the Commission under any other provision of law.

(2) Sections 824i, 824j, 824l, 824m of this title, and this section, shall not be construed to modify, impair, or supersede the antitrust laws. For purposes of this section, the term "antitrust laws" has the meaning given in subsection (a) of the first sentence of section 12 of Title 15, except that such term includes section 45 of Title 15 to the extent that such section relates to unfair methods of competition.

(f) Effective date of order; hearing; notice; review

(1) No order under section 824i or 824j of this title requiring the Tennessee Valley Authority (hereinafter in this subsection referred to as the "TVA") to take any action shall take effect for 60 days following the date of issuance of the order. Within 60 days following the issuance by the Commission of any order under section 824i or of section 824j of this title requiring the TVA to enter into any contract for the sale or delivery of power, the Commission may on its own motion initiate, or upon petition of any aggrieved person shall initiate, an evidentiary hearing to determine whether or not such sale or delivery would result in violation of the third sentence of section 15d(a) of the Tennessee Valley Authority Act of 1933 (16 U.S.C. 831n-4), hereinafter in this subsection referred to as the TVA Act [16 U.S.C.A. § 831 et seq.]

(2) Upon initiation of any evidentiary hearing under paragraph (1), the Commission shall give notice thereof to any applicant who applied for and obtained the order from the Commission, to any electric utility or other

entity subject to such order, and to the public, and shall promptly make the determination referred to in paragraph (1). Upon initiation of such hearing, the Commission shall stay the effectiveness of the order under section 824i or 824j of this title until whichever of the following dates is applicable--

(A) the date on which there is a final determination (including any judicial review thereof under paragraph (3)) that no such violation would result from such order, or

(B) the date on which a specific authorization of the Congress (within the meaning of the third sentence of section 15d(a) of the TVA Act [16 U.S.C.A. § 831n-4(a)]) takes effect.

(3) Any determination under paragraph (1) shall be reviewable only in the appropriate court of the United States upon petition filed by any aggrieved person or municipality within 60 days after such determination, and such court shall have jurisdiction to grant appropriate relief. Any applicant who applied for and obtained the order under section 824i or 824j of this title, and any electric utility or other entity subject to such order shall have the right to intervene in any such proceeding in such court. Except for review by such court (and any appeal or other review by an appellate court of the United States), no court shall have jurisdiction to consider any action brought by any person to enjoin the carrying out of any order of the Commission under section 824i or section 824j of this title requiring the TVA to take any action on the grounds that such action requires a specific authorization of the Congress pursuant to the third sentence of section 15d(a) of the TVA Act [16 U.S.C.A. § 831n-4(a)].

(g) Prohibition on orders inconsistent with retail marketing areas

No order may be issued under this chapter which is inconsistent with any State law which governs the retail marketing areas of electric utilities.

(h) Prohibition on mandatory retail wheeling and sham wholesale transactions

No order issued under this chapter shall be conditioned upon or require the transmission of electric energy:

(1) directly to an ultimate consumer, or

(2) to, or for the benefit of, an entity if such electric energy would be sold by such entity directly to an ultimate consumer, unless:

(A) such entity is a Federal power marketing agency; the Tennessee Valley Authority; a State or any political subdivision of a State (or an agency, authority, or instrumentality of a State or a political subdivision); a corporation or association that has ever received a loan for the purposes of providing electric service from the Administrator of the Rural Electrification Administration under the Rural Electrification Act of 1936 [7 U.S.C.A. § 901 et seq.]; a person having an obligation arising under State or local law (exclusive of an obligation arising solely from a contract entered into by such person) to provide electric service to the public; or any corporation or association which is wholly owned, directly or indirectly, by any one or more of the foregoing; and

(B) such entity was providing electric service to such ultimate consumer on October 24, 1992, or would utilize transmission or distribution facilities that it owns or controls to deliver all such electric energy to such electric consumer.

Nothing in this subsection shall affect any authority of any State or local government under State law concerning the

transmission of electric energy directly to an ultimate consumer.

(i) Laws applicable to Federal Columbia River Transmission System

(1) The Commission shall have authority pursuant to section 824i of this title, section 824j of this title, this section, and section 824l of this title to (A) order the Administrator of the Bonneville Power Administration to provide transmission service and (B) establish the terms and conditions of such service. In applying such sections to the Federal Columbia River Transmission System, the Commission shall assure that--

(i) the provisions of otherwise applicable Federal laws shall continue in full force and effect and shall continue to be applicable to the system; and

(ii) the rates for the transmission of electric power on the system shall be governed only by such otherwise applicable provisions of law and not by any provision of section 824i of this title, section 824j of this title, this section, or section 824l of this title, except that no rate for the transmission of power on the system shall be unjust, unreasonable, or unduly discriminatory or preferential, as determined by the Commission.

(2) Notwithstanding any other provision of this chapter with respect to the procedures for the determination of terms and conditions for transmission service--

(A) when the Administrator of the Bonneville Power Administration either (i) in response to a written request for specific transmission service terms and conditions does not offer the requested terms and conditions, or (ii) proposes to establish terms and conditions of general applicability for transmission service on the Federal Columbia River

Transmission System, then the Administrator may provide opportunity for a hearing and, in so doing, shall--

(I) give notice in the Federal Register and state in such notice the written explanation of the reasons why the specific terms and conditions for transmission services are not being offered or are being proposed;

(II) adhere to the procedural requirements of paragraphs (1) through (3) of section 839e(i) of this title, except that the hearing officer shall, unless the hearing officer becomes unavailable to the agency, make a recommended decision to the Administrator that states the hearing officer's findings and conclusions, and the reasons or basis thereof, on all material issues of fact, law, or discretion presented on the record; and

(III) make a determination, setting forth the reasons for reaching any findings and conclusions which may differ from those of the hearing officer, based on the hearing record, consideration of the hearing officer's recommended decision, section 824j of this title and this section, as amended by the Energy Policy Act of 1992, and the provisions of law as preserved in this section; and

(B) if application is made to the Commission under section 824j of this title for transmission service under terms and conditions different than those offered by the Administrator, or following the denial of a request for transmission service by the Administrator, and such application is filed within 60 days of the Administrator's final determination

and in accordance with Commission procedures, the Commission shall--

(i) in the event the Administrator has conducted a hearing as herein provided for (I) accord parties to the Administrator's hearing the opportunity to offer for the Commission record materials excluded by the Administrator from the hearing record, (II) accord such parties the opportunity to submit for the Commission record comments on appropriate terms and conditions, (III) afford those parties the opportunity for a hearing if and to the extent that the Commission finds the Administrator's hearing record to be inadequate to support a decision by the Commission, and (IV) establish terms and conditions for or deny transmission service based on the Administrator's hearing record, the Commission record, section 824j of this title and this section, as amended by the Energy Policy Act of 1992, and the provisions of law as preserved in this section, or

(ii) in the event the Administrator has not conducted a hearing as herein provided for, determine whether to issue an order for transmission service in accordance with section 824j of this title and this section, including providing the opportunity for a hearing.

(3) Notwithstanding those provisions of section 825l(b) of this title which designate the court in which review may be obtained, any party to a proceeding concerning transmission service sought to be furnished by the Administrator of the Bonneville Power Administration seeking review of an order issued by the Commission in such proceeding shall obtain a review of such order in the United States Court of Appeals for the Pacific

Northwest, as that region is defined by section 839a(14) of this title.

(4) To the extent the Administrator of the Bonneville Power Administration cannot be required under section 824j of this title, as a result of the Administrator's other statutory mandates, either to (A) provide transmission service to an applicant which the Commission would otherwise order, or (B) provide such service under rates, terms, and conditions which the Commission would otherwise require, the applicant shall not be required to provide similar transmission services to the Administrator or to provide such services under similar rates, terms, and conditions.

(5) The Commission shall not issue any order under section 824i of this title, section 824j of this title, this section, or section 824l of this title requiring the Administrator of the Bonneville Power Administration to provide transmission service if such an order would impair the Administrator's ability to provide such transmission service to the Administrator's power and transmission customers in the Pacific Northwest, as that region is defined in section 839a(14) of this title, as is needed to assure adequate and reliable service to loads in that region.

(j) Equitability within territory restricted electric systems

With respect to an electric utility which is prohibited by Federal law from being a source of power supply, either directly or through a distributor of its electric energy, outside an area set forth in such law, no order issued under section 824j of this title may require such electric utility (or a distributor of such electric utility) to provide transmission services to another entity if the electric energy to be transmitted will be consumed within the area set forth in such Federal law, unless the order is in furtherance of a sale of electric energy to that electric utility: Provided, however,

That the foregoing provision shall not apply to any area served at retail by an electric transmission system which was such a distributor on October 24, 1992 and which before October 1, 1991, gave its notice of termination under its power supply contract with such electric utility.

(k) ERCOT utilities

(1) Rates

Any order under section 824j of this title requiring provision of transmission services in whole or in part within ERCOT shall provide that any ERCOT utility which is not a public utility and the transmission facilities of which are actually used for such transmission service is entitled to receive compensation based, insofar as practicable and consistent with subsection (a) of this section, on the transmission ratemaking methodology used by the Public Utility Commission of Texas.

(2) Definitions

For purposes of this subsection--

(A) the term "ERCOT" means the Electric Reliability Council of Texas; and

(B) the term "ERCOT utility" means a transmitting utility which is a member of ERCOT.

[16 U.S.C. § 824l]

§ 824l. Information requirements

(a) Requests for wholesale transmission services

Whenever any electric utility, Federal power marketing agency, or any other person generating electric energy for sale for resale makes a good faith request to a transmitting utility to provide wholesale transmission services and requests specific rates and charges, and other terms and conditions, unless the transmitting utility agrees to provide such services at rates, charges, terms and conditions acceptable to such person, the transmitting utility shall, within 60 days of its receipt of the request, or other mutually agreed upon period, provide such person with a detailed written explanation, with specific reference to the facts and circumstances of the request, stating (1) the transmitting utility's basis for the proposed rates, charges, terms, and conditions for such services, and (2) its analysis of any physical or other constraints affecting the provision of such services.

(b) Transmission capacity and constraints

Not later than 1 year after the enactment of this section, the Commission shall promulgate a rule requiring that information be submitted annually to the Commission by transmitting utilities which is adequate to inform potential transmission customers, State regulatory authorities, and the public of potentially available transmission capacity and known constraints.

[16 U.S.C. § 825l]

§ 825l. Review of orders

(a) Application for rehearing; time periods; modification of order

Any person, State, municipality, or State commission aggrieved by an order issued by the Commission in a proceeding under this chapter to which such person, State, municipality, or State commission is a party may apply for a rehearing within thirty days after the issuance of such order. The application for rehearing shall set forth specifically the ground or grounds upon which such application is based. Upon such application the Commission shall have power to grant or deny rehearing or to abrogate or modify its order without further hearing. Unless the Commission acts upon the application for rehearing within thirty days after it is filed, such application may be deemed to have been denied. No proceeding to review any order of the Commission shall be brought by any person unless such person shall have made application to the Commission for a rehearing thereon. Until the record in a proceeding shall have been filed in a court of appeals, as provided in subsection (b) of this section, the Commission may at any time, upon reasonable notice and in such manner as it shall deem proper, modify or set aside, in whole or in part, any finding or order made or issued by it under the provisions of this chapter.

(b) Judicial review

Any party to a proceeding under this chapter aggrieved by an order issued by the Commission in such proceeding may obtain a review of such order in the United States Court of Appeals for any circuit wherein the licensee or public utility to which the order relates is located or has its principal place of business, or in the United States Court of Appeals for the District of Columbia, by filing in such court, within

sixty days after the order of the Commission upon the application for rehearing, a written petition praying that the order of the Commission be modified or set aside in whole or in part. A copy of such petition shall forthwith be transmitted by the clerk of the court to any member of the Commission and thereupon the Commission shall file with the court the record upon which the order complained of was entered, as provided in section 2112 of Title 28. Upon the filing of such petition such court shall have jurisdiction, which upon the filing of the record with it shall be exclusive, to affirm, modify, or set aside such order in whole or in part. No objection to the order of the Commission shall be considered by the court unless such objection shall have been urged before the Commission in the application for rehearing unless there is reasonable ground for failure so to do. The finding of the Commission as to the facts, if supported by substantial evidence, shall be conclusive. If any party shall apply to the court for leave to adduce additional evidence, and shall show to the satisfaction of the court that such additional evidence is material and that there were reasonable grounds for failure to adduce such evidence in the proceedings before the Commission, the court may order such additional evidence to be taken before the Commission and to be adduced upon the hearing in such manner and upon such terms and conditions as to the court may seem proper. The Commission may modify its findings as to the facts by reason of the additional evidence so taken, and it shall file with the court such modified or new findings which, if supported by substantial evidence, shall be conclusive, and its recommendation, if any, for the modification or setting aside of the original order. The judgment and decree of the court, affirming, modifying, or setting aside, in whole or in part, any such order of the Commission, shall be final, subject to review by the Supreme Court of the United States upon certiorari or certification as provided in section 1254 of Title 28.

(c) Stay of Commission's order

The filing of an application for rehearing under subsection (a) of this section shall not, unless specifically ordered by the Commission, operate as a stay of the Commission's order. The commencement of proceedings under subsection (b) of this section shall not, unless specifically ordered by the court, operate as a stay of the Commission's order.

APPENDIX H

List of Parties to the Proceeding

APPENDIX H

LIST OF PARTIES TO THE PROCEEDING

Pursuant to Rule 14 of the Supreme Court of the United States, the petitioners and intervenors before the Court below are as follows:

Action Alliance of Senior Citizens of Greater Pennsylvania

Alabama Power Company, et al. (The Southern Companies)

American Forest & Paper Association

American Iron And Steel Institute

American Public Power Association

Arkansas Public Service Commission

Atlantic City Electric Company

Board of Water, Light And Sinking Fund Comm'ns of City of Dalton, Georgia

Boston Edition Company, et al.

Cajun Electric Power Coop. Inc. (Trustee)

Carolina Power & Light Company

Central Montana Electric Power Cooperative, Inc.

Central Vermont Public Service Corporation

Chemical Manufacturers Association

Cincinnati Gas & Electric Co.

Cities of Benton, et al.

Citizens Action Coalition of Indiana, Inc.

Citizens For a Sound Economy

Citizens Power, Inc.

The City and County of San Francisco

City of Alma, Michigan

City of Cleveland, Ohio

City of Lakeland, Florida

City of Tallahassee, Florida

Coalition For Economic Competition

Commission and The Public Staff of The North Carolina Utilities Comm'n

Commonwealth Edison Company

Consolidated Edison Company of New York, Inc.

Consumer Energy Company

Council of Industrial Boiler Owners

CSW Operating Companies
(Central Power & Light Company, West Texas Utilities Company, Public Service Company of Oklahoma and Southwestern Electric Power Company) -

Dairyland Power Cooperative

The Dayton Power and Light Co.

The Detroit Edison Company

Duke Energy Trading And Marketing
(Formerly PANENERGY Trading and Market Services)

Edison Electric Institute

El Paso Electric Company

Electric Clearinghouse, Inc.

Electric Power Supply Association

Electricity Consumers Resource Council

ENRON Power Marketing

ENTERGY Services Inc.

Federal Energy Regulatory Commission

First Energy Corp.
(Formerly Ohio Edison Company, the Cleveland Electric Illuminating Co., and The Toledo Edison Co.)

Florida Municipal Power Agency

Florida Power & Light Company

Florida Power Corporation

Florida Public Service Commission

Gainesville Regional Utilities

Georgia Transmission Corporation

GPU Energy Companies
(Formerly, General Public Utilities Service, Inc.)

H.Q. Energy Services (U.S.)

Hydro-Quebec

Idaho Public Utilities Commission

Illinois Commerce Commission

Illinois Power Company

Indiana Industrial Energy Consumers, Inc.

Indiana Office of Utility Consumer Counselor

Indianapolis Power & Light Co.

Jacksonville Electric Authority

Kansas City Power & Light Company

Kissimmee Utility Authority

Long Island Lighting Co.

Louisiana Energy And Power Authority

Massachusetts Municipal Wholesale Electric Company

Michigan South Central Power Agency

Multiple Intervenors

Municipal Electric Utilities of Wisconsin

National Association of Regulatory Utility Commissioners

National Association of State Utility Consumer Advocates

National Rural Electric Cooperative Association

Nebraska Public Power District

New England Electric Service

New England Power Company

New Jersey Board of Public Utilities

New York State Electric & Gas Corporation

Niagara Mohawk Power Corp.

North Carolina Utilities

Northeast Texas Electric Cooperative of Texas, Inc.

Northeast Utilities Service Company and Northeast Utilities

Ohio Consumers' Counsel

Ontario Hydro

PANENERGY Trading and Market Services

Pennsylvania Consumer Action Network

Pennsylvania Municipal Electric Association

Pennsylvania Rural Electric Association, et al.

People of The State of New York, et al. and Public Service Commission of The State of New York

PSI Energy, Inc.

Public Citizen, Inc.

Public Power Association of New Jersey

Public Service Commission of Florida

Public Service Commission of New York

Public Service Commission of Wyoming
Public Service Company of New Mexico
Public Service Electric & Gas Company
Public Utilities Commission of Idaho
Public Utilities Commission of North Carolina
Public Utilities Commission of The State of Colorado
Puget Sound Energy, Inc.
Rochester Gas & Electric Corporation
Safe Energy Communication Council
Sam Rayburn G&T Electric
San Diego Gas & Electric Co.
SASKPOWER
South Carolina Electric & Gas Company
Southern California Edison Co.
Southern California Gas Company
Suffolk County Electric Agency
Tex-La Electric Cooperative of Texas, Inc.
Transmission Access Policy Study Group
Transmission Dependent Utility Systems
U.S. Public Interest Research Group
United Homeowners Association
Vermont Board of Public Utilities
Vermont Department of Public Service
Virginia Electric & Power Co.
Virginia State Corporation Commission
Washington Utilities and Transportation Commission

Wisconsin Power & Light Co.

Wisconsin Public Service Corp.

Wolverine Power Supply Cooperative, Inc.

Wyoming Public Service Commission